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MONTANA CODE ANNOTATED
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CONTENTS

Volume 1
CONSTITUTION
GOVERNMENT-RELATED

Titles
1. General Laws and Definitions
2. State Government Administration
3. Judiciary, Courts
4. Reserved
5. Legislative Branch
6. Reserved

Volume 2
LOCAL GOVERNMENT

Titles
7. Local Government
(Chs. 1-10)

Volume 3
LOCAL GOVERNMENT

Titles
7. Local Government
(Chs. 11-35)
8 and 9. Reserved

Volume 4
GOVERNMENT-RELATED

Titles
0. Military Affairs and Disaster and Emergency Services
1 and 12. Reserved
3. Elections
4. Reserved
5. Taxation)
6. Alcohol and Tobacco) Finances
7. State Finance)
8. Public Contracts

Volume 5
RETIREMENT — EDUCATION — LEISURE TIME

Titles
19. Public Retirement Systems
20. Education
21. Reserved
22. Libraries, Arts, and Antiquities
23. Parks, Recreation, Sports, and Gambling
24. Reserved

Volume 6
CIVIL PROCEDURE — LEGAL RELATIONSHIPS — TRADE AND COMMERCE

Titles
25. Civil Procedure
26. Evidence
27. Remedies
28. Contracts and Other Obligations
29. Reserved
30. Trade and Commerce

Volume 7
CREDIT — FINANCE — INSURANCE

Titles
31. Credit Transactions and Relationships
32. Financial Institutions
33. Insurance
34. Reserved

Volume 8
CORPORATIONS — PROFESSIONS — LABOR

Titles
35. Corporations, Partnerships, and Associations
36. Reserved
37. Professions and Occupations
38. Reserved
39. Labor

Volume 9
FAMILY — CRIME — HEALTH

Titles
40. Family Law
41. Minors
42 and 43. Reserved
44. Law Enforcement
45. Crimes
46. Criminal Procedure
47 and 48. Reserved
49. Human Rights
50. Health and Safety
51 and 52. Reserved

Volume 10
SOCIAL SERVICES — TRANSPORTATION — UTILITIES

Titles
53. Social Services and Institutions
54 - 59. Reserved
60. Highways
61. Motor Vehicles and Traffic Regulations
62 - 66. Reserved
67. Aeronautics
68. Reserved
69. Public Utilities and Carriers

Volume 11
PROPERTY — ESTATES

Titles
70. Property
71. Mortgages, Pledges, and Liens
72. Estates, Trusts, and Fiduciary Relationships
73 and 74. Reserved

CONTENTS

Volume 12
NATURAL RESOURCES — AGRICULTURE — LIVESTOCK

Titles
75. Environmental Protection
76. Land Resources and Use
77. State Lands
78 and 79. Reserved
80. Agriculture
81. Livestock

Volume 13
NATURAL RESOURCES — MINERALS— WATER — WILDLIFE — PLANNING

Titles
82. Minerals, Oil, and Gas
83 and 84. Reserved
85. Water Use
86. Reserved
87. Fish and Wildlife
88 and 89. Reserved
90. Planning, Research, and Development
91 - 99. Reserved

INDEX

TITLE 25

CIVIL PROCEDURE

h.
1. General Provisions.
2. Venue.
3. Service of Process and Other Papers.
4. Pleadings, Motions, and Other Papers.
5. Parties.
Chapter 6 reserved.
7. Trials.
8. Deposit in Court — Delivery to Party.
9. Judgment.
0. Costs.
1. New Trial.
2. Appeal to Supreme Court.
3. Execution of Judgment.
4. Proceedings in Aid of Execution.
5. Liability of Joint Debtors.
Chapters 16 through 19 reserved.
0. Rules of Civil Procedure.
1. Rules of Appellate Civil Procedure.
Chapters 22 through 29 reserved.
0. Procedure in Municipal Courts.
1. Procedure in Justices' Courts.
2. Procedure in City Courts.
3. Appeal to District Court From Justices' and City Courts.
4. Small Claims Procedure — District Court.
5. Small Claims Procedure — Justice's Court.

CHAPTER 1

GENERAL PROVISIONS

Part 1 — Civil Actions—Form and Commencement

ection
5-1-101. One form of civil action.
5-1-102. Limitations on commencing actions.
5-1-103. When action considered pending.
Sections 25-1-104 through 25-1-110 reserved.
5-1-111. Application of definitions to special proceedings.

Part 2 — Fees

5-1-201. Fees of clerk of district court.
5-1-202. Fee for court reporter.

Part 3 — Time

5-1-301. Extension of time.

Part 4 — Undertakings for Security

5-1-401. Deposit of money in lieu of undertaking.
5-1-402. Governmental entities not required to give security.

Part 5 — Notice to Attorney General

25-1-501. Notice to be given to attorney general when state department or board initiates o intervenes in an action.

25-1-502. Notice of appeal to be served on attorney general.

Part 1

Civil Actions — Form and Commencement

25-1-101. One form of civil action. There is in this state but one form of civil action for the enforcement or protection of private rights and the redress or prevention of private wrongs.

History: En. Sec. 1, p. 43, Bannack Stat.; amd. Sec. 1, p. 135, L. 1867; amd. Sec. 1, p. 28, Cod. Stat. 1871; re-en. Sec. 1, p. 40, L. 1877; re-en. Sec. 1, 1st Div. Rev. Stat. 1879; re-en. Sec. 1, 1st Div. Comp. Stat. 1887; amd. Sec. 460, C. Civ. Proc. 1895; re-en. Sec. 6425, Rev. C. 1907; re-en. Sec. 9008, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 307; re-en. Sec. 9008, R.C.M. 1935; R.C.M. 1947, 93-2301.

25-1-102. Limitations on commencing actions. (1) Civil actions can only be commenced within the periods prescribed in [93-2501 to 93-2720] after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute.

(2) The word "action", as used in this section, is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature.

History: (1)En. Sec. 1, p. 466, Bannack Stat.; re-en. Sec. 1, p. 515, Cod. Stat. 1871; re-en. Sec. 28, p. 45, L. 1877; re-en. Sec. 28, 1st Div. Rev. Stat. 1879; re-en. Sec. 28, 1st Div. Comp. Stat. 1887; re-en. Sec. 470, C. Civ. Proc. 1895; re-en. Sec. 6428, Rev. C. 1907; re-en. Sec. 9011, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 312; re-en. Sec. 9011, R.C.M. 1935; Sec. 93-2401, R.C.M. 1947; (2)En. Sec. 559, C. Civ. Proc. 1895; re-en. Sec. 6476, Rev. C. 1907; re-en. Sec. 9066, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 363; re-en. Sec. 9066, R.C.M. 1935; Sec. 93-2720, R.C.M. 1947; R.C.M. 1947, 93-2401, 93-2720.

25-1-103. When action considered pending. An action is deemed to be pending from the time of its commencement until its final determination upon appeal or until the time for appeal has passed, unless the judgment is sooner satisfied.

History: En. Sec. 1895, C. Civ. Proc. 1895; re-en. Sec. 7188, Rev. C. 1907; re-en. Sec. 9821, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1049; re-en. Sec. 9821, R.C.M. 1935; R.C.M. 1947, 93-8706.

25-1-104 through 25-1-110 reserved.

25-1-111. Application of definitions to special proceedings. A judgment in a special proceeding is the final determination of the rights of the parties therein. The definitions of a motion and an order in a civil action are applicable to similar acts in a special proceeding.

History: En. Sec. 1931, C. Civ. Proc. 1895; re-en. Sec. 7201, Rev. C. 1907; re-en. Sec. 9835, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1064; re-en. Sec. 9835, R.C.M. 1935; R.C.M. 1947, 93-8802.

Compiler's Comments

Obsolescence. The Code Commissioner's staff feels that this section should be repealed because the first sentence is redundant with Rule 54(a), M.R.Civ.P., and the second sentence no longer has any application since section 93-8401, R.C.M. 1947, which defined "order" and "motion", was repealed in 1961.

Part 2

Fees

25-1-201. Fees of clerk of district court. (1) The clerk of the district court shall collect the following fees:

(a) at the commencement of each action or proceeding, from the plaintiff or petitioner, $20; and for filing a complaint in intervention, from the intervenor, $20;

(b) from each defendant or respondent, on his appearance, $10;

(c) on the entry of judgment, from the prevailing party, $10;

(d) for preparing copies of papers on file in his office, 25 cents per page;

(e) for each certificate or oath and jurat, with seal, 50 cents;

(f) for oath and jurat, with seal, 50 cents;

(g) for administering oath, 25 cents;

(h) for taking depositions, per folio, 20 cents;

(i) for filing and docketing a transcript of judgment or abstract of judgment from all other courts, $5;

(j) for issuing an execution or order of sale on a foreclosure of a lien, $2;

(k) for transmission of records or files or transfer of a case to another court, $5;

(l) for filing and entering papers received by transfer from other courts, $10;

(m) for issuing a marriage license, $15;

(n) on the filing of an application for informal, formal, or supervised probate or for the appointment of a personal representative or the filing of a petition for the appointment of a guardian or conservator, from the applicant or petitioner, $35, which includes the fee for filing a will for probate.

(2) Forty percent of all fees collected by the clerk of the district court shall be deposited in and credited to the general fund of the county. The remaining portion of the fees shall be remitted to the state to be deposited as provided in 19-5-404.

History: En. Sec. 4636, Pol. C. 1895; re-en. Sec. 3169, Rev. C. 1907; amd. Sec. 1, Ch. 88, L. 1917; re-en. Sec. 4918, R.C.M. 1921; re-en. Sec. 4918, R.C.M. 1935; amd. Sec. 1, Ch. 218, L. 1967; amd. Sec. 1, Ch. 33, L. 1977; amd. Sec. 1, Ch. 548, L. 1977; R.C.M. 1947, 25-232.

25-1-202. Fee for court reporter. In every issue of fact in civil actions tried before the court or jury, before the trial commences, there must be paid into the hands of the clerk of the court by each party to the suit the sum of $3, which sum must be paid by said clerk into the treasury of the county where the cause is tried to be applied upon the payment of the salary of the reporter. The prevailing party may have the amount so paid by him taxed in his bill of costs as proper disbursements.

History: En. Sec. 1979, 5th Div. Comp. Stat. 1887; re-en. Sec. 374, C. Civ. Proc. 1895; re-en. Sec. 6377, Rev. C. 1907; re-en. Sec. 8932, R.C.M. 1921; re-en. Sec. 8932, R.C.M. 1935; amd. Sec. 5, Ch. 22, L. 1961; R.C.M. 1947, 93-1905.

Part 3

Time

25-1-301. Extension of time. When an act to be done, as provided in this code, relates to the pleadings in the action, the undertakings to be filed, the justification of sureties, the preparation of statements or of bills of exceptions or of amendments thereto, or the service of notices other than of appeal, the time allowed by this code may be extended, upon good cause shown, by the court in which the action is pending or a judge thereof; but such extension shall not exceed 90 days without the consent of the adverse party.

History: **En. Sec. 1897, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 27, L. 1903; re-en. Sec. 7190, Rev. C. 1907; re-en. Sec. 9823, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1054; re-en. Sec. 9823, R.C.M. 1935; R.C.M. 1947, 93-8708.**

Part 4

Undertakings for Security

25-1-401. Deposit of money in lieu of undertaking. In all cases where an undertaking or bond with sureties is required by the provisions of this code, the plaintiff or defendant may deposit with the clerk of the court or justice of the peace or city judge, as the case may be, a sum of money equal to the amount required by the undertaking or bond, which shall be taken as security in the place thereof. At any time such deposit may be withdrawn by the party making it upon giving the undertaking with sufficient sureties as required by law, approved by the clerk or justice or judge, upon notice to the adverse party or his attorney, who may object to the sufficiency of the sureties in the same manner as though the undertaking were filed in the first instance.

History: **En. Sec. 1904, C. Civ. Proc. 1895; re-en. Sec. 7198, Rev. C. 1907; re-en. Sec. 9831, R.C.M. 1921; re-en. Sec. 9831, R.C.M. 1935; R.C.M. 1947, 93-8716.**

25-1-402. Governmental entities not required to give security. In any civil action or proceeding wherein the state, a county, or a municipal corporation or any officer in his official capacity on behalf of the state or a county, city, or town is a party plaintiff or defendant, no bond, undertaking, or security can be required of the state, county, municipal corporation, or town or any officer thereof; but on complying with the other provisions of this code, the state, county, municipal corporation, or town or any officer thereof acting in his official capacity has the same rights, remedies, and benefits as if the bond, undertaking, or security were given and approved as required by this code. The board of trustees of any school district is entitled to the benefit of this section.

History: **En. Sec. 1902, C. Civ. Proc. 1895; re-en. Sec. 7196, Rev. C. 1907; re-en. Sec. 9829, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1058; re-en. Sec. 9829, R.C.M. 1935; R.C.M. 1947, 93-8714.**

Part 5

Notice to Attorney General

25-1-501. Notice to be given to attorney general when state department or board initiates or intervenes in an action. When a department or board of this state initiates or intervenes in an action in any court, a copy of the complaint, counterclaim, or cross-claim must be served on the attorney general.

History: **En. Sec. 1, Ch. 91, L. 1979.**

25-1-502. Notice of appeal to be served on attorney general. When a department or board of this state appeals from a judgment or order entered in any court of this state, a copy of the notice of appeal must be served on the attorney general.

History: En. Sec. 2, Ch. 91, L. 1979.

CHAPTER 2

VENUE

Part 1 — Proper Venue

Section
25-2-101. Contract actions.
25-2-102. Tort actions.
25-2-103. Actions involving real property.
25-2-104. Actions to recover statutory penalty or forfeiture.
25-2-105. Actions against public officers or their agents.
25-2-106. Actions against counties.
25-2-107. Actions in which defendant is about to depart.
25-2-108. Other actions.

Part 2 — Change of Venue

25-2-201. When change of venue required.
25-2-202. Change of venue on agreement of parties.
25-2-203. Papers to be transmitted.
25-2-204. Jurisdiction preserved.
25-2-205. Allocation of costs between counties.
25-2-206. Judgment affecting real property to be transmitted.

Part 1

Proper Venue

25-2-101. Contract actions. Actions upon contracts may be tried in the county in which the contract was to be performed, subject, however, to the power of the court to change the place of trial as provided in this code.

History: En. Sec. 20, p. 46, Bannack Stat.; amd. Sec. 20, p. 138, L. 1867; en. Sec. 25, p. 31, Cod. Stat. 1871; re-en. Sec. 59, p. 52, L. 1877; re-en. Sec. 59, 1st Div. Rev. Stat. 1879; re-en. Sec. 59, 1st Div. Comp. Stat. 1887; re-en. Sec. 613, C. Civ. Proc. 1895; re-en. Sec. 6504, Rev. C. 1907; re-en. Sec. 9096, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 395; re-en. Sec. 9096, R.C.M. 1935; R.C.M. 1947, 93-2904(part).

25-2-102. Tort actions. Actions for torts may be tried in the county where the tort was committed, subject, however, to the power of the court to change the place of trial as provided in this code.

History: En. Sec. 20, p. 46, Bannack Stat.; amd. Sec. 20, p. 138, L. 1867; en. Sec. 25, p. 31, Cod. Stat. 1871; re-en. Sec. 59, p. 52, L. 1877; re-en. Sec. 59, 1st Div. Rev. Stat. 1879; re-en. Sec. 59, 1st Div. Comp. Stat. 1887; re-en. Sec. 613, C. Civ. Proc. 1895; re-en. Sec. 6504, Rev. C. 1907; re-en. Sec. 9096, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 395; re-en. Sec. 9096, R.C.M. 1935; R.C.M. 1947, 93-2904(part).

25-2-103. Actions involving real property. (1) Actions for the following causes must be tried in the county in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial as provided in this code:

(a) for the recovery of real property or of an estate or an interest therein or for the determination, in any form, of such right or interest;

(b) for injuries to real property;

(c) for the partition of real property;

(d) for the foreclosure of all liens and mortgages on real property.

(2) Where the real property is situated partly in one county and partly in another, the plaintiff may select either of the counties and the county so selected is the proper county for the trial of such action.

(3) All actions for the recovery of the possession of, quieting the title to, or the enforcement of liens upon real property must be commenced in the county in which the real property, or any part thereof, affected by such action or actions is situated.

History: (1), (2)En. Sec. 18, p. 46, Bannack Stat.; en. Sec. 18, p. 137, L. 1867; re-en. Sec. 23, p. 30, Cod. Stat. 1871; re-en. Sec. 56, p. 51, L. 1877; re-en. Sec. 56, 1st Div. Rev. Stat. 1879; re-en. Sec. 56, 1st Div. Comp. Stat.1887; re-en. Sec. 610, C. Civ. Proc. 1895; re-en. Sec. 6501, Rev. C. 1907; re-en. Sec. 9093, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 392; re-en. Sec. 9093, R.C.M. 1935; Sec. 93-2901, R.C.M. 1947; (3)En. Sec. 43, C. Civ. Proc. 1895; re-en. Sec. 6277, Rev. C. 1907; re-en. Sec. 8831, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 78; re-en. Sec. 8831, R.C.M. 1935; Sec. 93-320, R.C.M. 1947; R.C.M. 1947, 93-320(part), 93-2901.

25-2-104. Actions to recover statutory penalty or forfeiture. Actions for the recovery of a penalty or forfeiture imposed by statute must be tried in the county where the cause or some part thereof arose, subject to the power of the court to change the place of trial, except that when it is imposed for an offense committed on a lake, river, or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river, or stream and opposite to the place where the offense was committed.

History: En. Sec. 19, p. 46, Bannack Stat.; re-en. Sec. 19, p. 137, L. 1867; re-en. Sec. 24, p. 31, Cod. Stat. 1871; re-en. Sec. 57, p. 51, L. 1877; re-en. Sec. 57, 1st Div. Rev. Stat. 1879; re-en. Sec. 57, 1st Div. Comp. Stat. 1887; re-en. Sec. 611, C. Civ. Proc. 1895; re-en. Sec. 6502, Rev. C. 1907; re-en. Sec. 9094, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 393; re-en. Sec. 9094, R.C.M. 1935; R.C.M. 1947, 93-2902(part).

25-2-105. Actions against public officers or their agents. Actions against a public officer or person specially appointed to execute his duties for an act done by him in virtue of his office or against a person who, by his command or in his aid, does anything touching the duties of such officer must be tried in the county where the cause or some part thereof arose, subject to the power of the court to change the place of trial.

History: En. Sec. 19, p. 46, Bannack Stat.; re-en. Sec. 19, p. 137, L. 1867; re-en. Sec. 24, p. 31, Cod. Stat. 1871; re-en. Sec. 57, p. 51, L. 1877; re-en. Sec. 57, 1st Div. Rev. Stat. 1879; re-en. Sec. 57, 1st Div. Comp. Stat. 1887; re-en. Sec. 611, C. Civ. Proc. 1895; re-en. Sec. 6502, Rev. C. 1907; re-en. Sec. 9094, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 393; re-en. Sec. 9094, R.C.M. 1935; R.C.M. 1947, 93-2902(part).

25-2-106. Actions against counties. An action against a county may be commenced and tried in such county unless such action is brought by a county, in which case it may be commenced and tried in any county not a party thereto.

History: En. Sec. 58, p. 52, L. 1877; re-en. Sec. 58, 1st Div. Rev. Stat. 1879; re-en. Sec. 58, 1st Div. Comp. Stat. 1887; amd. Sec. 612, C. Civ. Proc. 1895; re-en. Sec. 6503, Rev. C. 1907; re-en. Sec. 9095, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 394; re-en. Sec. 9095, R.C.M. 1935; R.C.M. 1947, 93-2903.

25-2-107. Actions in which defendant is about to depart. If any defendant or defendants may be about to depart from the state, the action may be tried in any county where either of the parties may reside or service be had, subject, however, to the power of the court to change the place of trial as provided in this code.

History: En. Sec. 20, p. 46, Bannack Stat.; amd. Sec. 20, p. 138, L. 1867; en. Sec. 25, p. 31, Cod. Stat. 1871; re-en. Sec. 59, p. 52, L. 1877; re-en. Sec. 59, 1st Div. Rev. Stat. 1879; re-en. Sec. 59, 1st Div. Comp. Stat. 1887; re-en. Sec. 613, C. Civ. Proc. 1895; re-en. Sec. 6504, Rev. C. 1907; re-en. Sec. 9096, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 395; re-en. Sec. 9096, R.C.M. 1935; R.C.M. 1947, 93-2904(part).

25-2-108. Other actions. In all other cases, the action shall be tried in the county in which the defendants or any of them may reside at the commencement of the action or where the plaintiff resides and the defendants or any of them may be found; or if none of the defendants reside in the state or, if residing in the state, the county in which they so reside be unknown to the plaintiff, the same may be tried in any county which the plaintiff may designate in his complaint, subject, however, to the power of the court to change the place of trial as provided in this code.

History: En. Sec. 20, p. 46, Bannack Stat.; amd. Sec. 20, p. 138, L. 1867; en. Sec. 25, p. 31, Cod. Stat. 1871; re-en. Sec. 59, p. 52, L. 1877; re-en. Sec. 59, 1st Div. Rev. Stat. 1879; re-en. Sec. 59, 1st Div. Comp. Stat. 1887; re-en. Sec. 613, C. Civ. Proc. 1895; re-en. Sec. 6504, Rev. C. 1907; re-en. Sec. 9096, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 395; re-en. Sec. 9096, R.C.M. 1935; R.C.M. 1947, 93-2904(part).

Part 2

Change of Venue

25-2-201. When change of venue required. The court or judge must, on motion, change the place of trial in the following cases:

(1) when the county designated in the complaint is not the proper county;

(2) when there is reason to believe that an impartial trial cannot be had therein;

(3) when the convenience of witnesses and the ends of justice would be promoted by the change.

History: En. Sec. 21, p. 46, Bannack Stat.; amd. Ch. 8, L. 3d Session 1866, which was set aside by Act of Congress of March 2, 1867; amd. Sec. 1, p. 68, L. 1867; amd. Sec. 27, p. 31, Cod. Stat. 1871; re-en. Sec. 62, p. 53, L. 1877; re-en. Sec. 62, 1st Div. Rev. Stat. 1879; re-en. Sec. 62, 1st Div. Comp. Stat. 1887; amd. Sec. 615, C. Civ. Proc. 1895; en. Ch. 2, Ex. L. 1903; re-en. Sec. 6506, Rev. C. 1907; re-en. Sec. 9098, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 397; re-en. Sec. 9098, R.C.M. 1935; amd. Sec. 1, Ch. 6, L. 1973; [(4) superseded by Sup. Ct. Ord., 34 St. Rep. 26, eff. March 1, 1977]; R.C.M. 1947, 93-2906.

25-2-202. Change of venue on agreement of parties. All the parties to an action, by stipulation or by consent in open court entered in the minutes, may agree that the place of trial may be changed to any county in the state. Thereupon the court must order the change as agreed upon.

History: En. Sec. 619, C. Civ. Proc. 1895; re-en. Sec. 6510, Rev. C. 1907; re-en. Sec. 9102, R.C.M. 1921; re-en. Sec. 9102, R.C.M. 1935; R.C.M. 1947, 93-2910.

25-2-203. Papers to be transmitted. When an order is made transferring an action or proceeding for trial, the clerk of the court must transmit the pleading and papers therein to the clerk of the court to which it is transferred.

History: En. Sec. 64, p. 53, L. 1877; re-en. Sec. 64, 1st Div. Rev. Stat. 1879; re-en. Sec. 64, 1s Div. Comp. Stat. 1887; re-en. Sec. 617, C. Civ. Proc. 1895; re-en. Sec. 6508, Rev. C. 1907; re-en. Sec 9100, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 399; re-en. Sec. 9100, R.C.M. 1935; amd. Sec. 1, Ch. 176 L. 1971; R.C.M. 1947, 93-2908(part).

25-2-204. Jurisdiction preserved. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein.

History: En. Sec. 64, p. 53, L. 1877; re-en. Sec. 64, 1st Div. Rev. Stat. 1879; re-en. Sec. 64, 1st Div. Comp. Stat. 1887; re-en. Sec. 617, C. Civ. Proc. 1895; re-en. Sec. 6508, Rev. C. 1907; re-en. Sec. 9100, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 399; re-en. Sec. 9100, R.C.M. 1935; amd. Sec. 1, Ch. 176, L. 1971; R.C.M. 1947, 93-2908(part).

25-2-205. Allocation of costs between counties. In case of a change of the place of trial from one county to another, as provided for in 25-2-201, the county in which the action or proceeding is tried shall recover from the county in which the action was commenced all additional costs or expenses that may have been incurred by such county by reason of extra jurors or bailiff's fees or other court expenses incurred by such county by reason of the hearing or trial of said action, motion, or proceeding. Such extra costs shall be allowed by the court, the clerk of the court of such county shall certify the same to the board of county commissioners of the county in which said action, motion, or proceeding was commenced, and said board shall allow and cause the same to be paid.

History: En. Sec. 1, Ch. 5, Ex. L. 1903; re-en. Sec. 6512, Rev. C. 1907; re-en. Sec. 9104, R.C.M. 1921; re-en. Sec. 9104, R.C.M. 1935; R.C.M. 1947, 93-2912.

25-2-206. Judgment affecting real property to be transmitted. When an action or proceeding affecting the title to or possession of real estate has been brought in or transferred to any court of a county other than the county in which the real estate or some portion of it is situated, the clerk of such court must, after final judgment therein, certify under his seal of office and transmit to the corresponding court of the county in which the real estate affected by the action is situated a copy of the judgment. The clerk receiving such copy must file, docket, and record the judgment in the record of the court, briefly designating it as a judgment transferred from .... court (naming the proper court).

History: En. Sec. 65, p. 54, L. 1877; re-en. Sec. 65, 1st Div. Rev. Stat. 1879; re-en. Sec. 65, 1st Div. Comp. Stat. 1887; re-en. Sec. 618, C. Civ. Proc. 1895; re-en. Sec. 6509, Rev. C. 1907; re-en. Sec. 9101, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 400; re-en. Sec. 9101, R.C.M. 1935; R.C.M. 1947, 93-2909.

CHAPTER 3

SERVICE OF PROCESS AND OTHER PAPERS

Part 1 — General Provisions

Section

25-3-101. Definitions.

Part 2 — Service by an Officer

25-3-201. Delivery of papers to officer.

25-3-202. When sheriff's execution of process justified and required.
25-3-203. Prepayment of cost of service.
25-3-204. Officer to exhibit process.
25-3-205. Execution of process when sheriff a party.
25-3-206. Execution by elisor.

Part 3 — Return of Service

25-3-301. Time and manner of return.
25-3-302. Sheriff's return prima facie evidence.

Part 4 — Service of Papers After Defendant's Appearance

25-3-401. Notice requirements after appearance of defendant.
25-3-402. Persons to be served.

Part 5 — Alternative Methods of Service

25-3-501. Service of telephonic or telegraphic copy.
25-3-502. Publication to be once a week.
25-3-503. What suffices as once a week.
25-3-504. Designating unknown persons as defendants.
25-3-505. Effect of service by publication upon unknown persons.

Part 6 — Service on Secretary of State Nonresident Motorists

25-3-601. Conditional granting of use of highways to nonresidents.
25-3-602. Operation of vehicle considered consent to service on secretary of state.
25-3-603. Operation of vehicle by agent.
25-3-604. Secretary of state's record of process served.

Part 1

General Provisions

25-3-101. Definitions. As used in parts 2 and 3 of this chapter, the following definitions apply:

(1) "Process" includes all writs, warrants, summonses, and orders of courts of justice or judicial officers.

(2) "Notice" includes all papers and orders (except process) required to be served in any proceeding before any court, board, or officer or required by law to be served independently of such proceeding.

History: En. Sec. 4380, Pol. C. 1895; re-en. Sec. 3009, Rev. C. 1907; re-en. Sec. 4773, R.C.M. 1921; Cal. Pol. C. Sec. 4175; re-en. Sec. 4773, R.C.M. 1935; R.C.M. 1947, 16-2701.

Part 2

Service by an Officer

25-3-201. Delivery of papers to officer. (1) It is the duty of the clerk of any district court, at the request of a party in any civil action pending in such court or his agent or attorney, to forward by mail any process, summons, or other papers required in the cause; and it is the duty of the sheriff or other officer to whom said papers may be directed to receive the same at the place where the same are directed. When process in one county is intended for service in another, it is the duty of the clerk to forward the same in like manner.

(2) Any writ, order, or other paper for service must be received at any place in the county where a sheriff or a deputy is found, but if papers are delivered for service away from the county seat, all necessary copies thereof must be furnished for service.

(3) If any sheriff or other officer refuse to receive any summons or other process at the point where directed to him or to serve the same, he is guilty of a misdemeanor and upon conviction thereof must be fined in any sum not exceeding $100.

History: (1), (3)En. Secs. 1, 2, p. 7, L. 1881; re-en. Sec. 76, 1st Div. Comp. Stat. 1887; en. Sec. 640, C. Civ. Proc. 1895; re-en. Sec. 6523, Rev. C. 1907; re-en. Sec. 9120, R.C.M. 1921; re-en. Sec. 9120, R.C.M. 1935; Sec. 93-3016, R.C.M. 1947; (2)En. Sec. 4634, Pol. C. 1895; re-en. Sec. 3167, Rev. C. 1907; amd. Sec. 1, Ch. 111, L. 1919; re-en. Sec. 4916, R.C.M. 1921; amd. Sec. 1, Ch. 111, L. 1927; amd. Sec. 1, Ch. 89, L. 1929; amd. Sec. 1, Ch. 121, L. 1933; re-en. Sec. 4916, R.C.M. 1935; amd. Sec. 1, Ch. 139, L. 1937; amd. Sec. 4, Ch. 121, L. 1941; amd. Sec. 2, Ch. 59, L. 1949; amd. Sec. 2, Ch. 82, L. 1957; amd. Sec. 1, Ch. 343, L. 1975; amd. Sec. 8, Ch. 439, L. 1975; Sec. 25-226, R.C.M. 1947; R.C.M. 1947, 25-226(part), 93-3016(part).

25-3-202. When sheriff's execution of process justified and required. A sheriff or other ministerial officer is justified in the execution of and must execute all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued.

History: En. Sec. 4395, Pol. C. 1895; re-en. Sec. 3024, Rev. C. 1907; re-en. Sec. 4788, R.C.M. 1921; Cal. Pol. C. Sec. 4187; re-en. Sec. 4788, R.C.M. 1935; R.C.M. 1947, 16-2716.

25-3-203. Prepayment of cost of service. In no case shall the officer receiving papers for service be required to serve the same unless the person in whose behalf the service is made or his agent or attorney first pay the cost of the service upon a demand therefor by the officer.

History: En. Secs. 1, 2, p. 7, L. 1881; re-en. Sec. 76, 1st Div. Comp. Stat. 1887; en. Sec. 640, C. Civ. Proc. 1895; re-en. Sec. 6523, Rev. C. 1907; re-en. Sec. 9120, R.C.M. 1921; re-en. Sec. 9120, R.C.M. 1935; R.C.M. 1947, 93-3016(part).

25-3-204. Officer to exhibit process. The officer executing such process must, then and at all times subsequent so long as he retains it, upon request, show the same with all papers attached to any person interested therein.

History: En. Sec. 4396, Pol. C. 1895; re-en. Sec. 3025, Rev. C. 1907; re-en. Sec. 4789, R.C.M. 1921; Cal. Pol. C. Sec. 4188; re-en. Sec. 4789, R.C.M. 1935; R.C.M. 1947, 16-2717.

25-3-205. Execution of process when sheriff a party. When the sheriff is a party to an action or proceeding, the process and orders therein which it would otherwise be the duty of the sheriff to execute must be executed by the coroner of the county.

History: En. Sec. 4399, Pol. C. 1895; re-en. Sec. 3028, Rev. C. 1907; re-en. Sec. 4792, R.C.M. 1921; Cal. Pol. C. Sec. 4191; re-en. Sec. 4792, R.C.M. 1935; R.C.M. 1947, 16-2720.

25-3-206. Execution by elisor. (1) Process or orders in an action or proceeding may be executed by a person residing in the county, designated by the court or a judge thereof, and denominated an elisor, in the following cases:

(a) The sheriff and coroner are both parties.

(b) Either of these officers is a party and the process is against the other.

(c) Either of these officers is a party and there is a vacancy in the office of the other.

(d) It appears by affidavit to the satisfaction of the court in which the proceeding is pending or the judge thereof that both of these officers are disqualified or, by reason of any bias, prejudice, or other cause, would not act promptly or impartially.

(2) When process is delivered to an elisor, he must execute and return it n the same manner as the sheriff is required to execute similar process. The court or judge may at any time on its own motion appoint an elisor.

History: En. Sec. 4400, Pol. C. 1895; re-en. Sec. 3029, Rev. C. 1907; re-en. Sec. 4793, R.C.M. 1921; Cal. Pol. C. Sec. 4192; re-en. Sec. 4793, R.C.M. 1935; R.C.M. 1947, 16-2721.

Part 3

Return of Service

25-3-301. Time and manner of return. (1) It shall be the duty of the sheriff or other person serving a summons or other process or order required by any of the provisions of this code, issued out of any of the district courts of this state, to make due and legal return of such service and file the same with the clerk of the court in which such action or proceeding is pending not more than 10 days after the making of such service where the same was made in the county in which such action or proceeding is pending and not more than 15 days after the making of such service when the same was made outside of the county in which such action or proceeding is pending. Any failure to make and file such return as required may be punished as a contempt of court.

(2) When process or notices are returnable to another county, the sheriff may enclose such process or notice in an envelope addressed to the officer who sent it and deposit it in the post office, prepaying postage.

(3) In the case of papers forwarded under 25-3-201, it is lawful for the officer to return the process to the court by mail or express. When process in one county is intended for service in another, the sheriff or other officer serving the same may make like return of the papers served.

History: (1)En. Sec. 1, Ch. 38, L. 1907; re-en. Sec. 6527, Rev. C. 1907; re-en. Sec. 9124, R.C.M. 1921; re-en. Sec. 9124, R.C.M. 1935; Sec. 93-3020, R.C.M. 1947; (2)En. Sec. 4385, Pol. C. 1895; re-en. Sec. 3014, Rev. C. 1907; re-en. Sec. 4778, R.C.M. 1921; Cal. Pol. C. Sec. 4177; re-en. Sec. 4778, R.C.M. 1935; Sec. 16-2706, R.C.M. 1947; (3)En. Secs. 1, 2, p. 7, L. 1881; re-en. Sec. 76, 1st Div. Comp. Stat. 1887; en. Sec. 640, C. Civ. Proc. 1895; re-en. Sec. 6523, Rev. C. 1907; re-en. Sec. 9120, R.C.M. 1921; re-en. Sec. 9120, R.C.M. 1935; Sec. 93-3016, R.C.M. 1947; R.C.M. 1947, 16-2706, 93-3016(part), 93-3020.

25-3-302. Sheriff's return prima facie evidence. The return of the sheriff upon process or notices is prima facie evidence of the facts in such return stated.

History: En. Sec. 4386, Pol. C. 1895; re-en. Sec. 3015, Rev. C. 1907; re-en. Sec. 4779, R.C.M. 1921; Cal. Pol. C. Sec. 4178; re-en. Sec. 4779, R.C.M. 1935; R.C.M. 1947, 16-2707.

Part 4

Service of Papers After Defendant's Appearance

25-3-401. Notice requirements after appearance of defendant. A defendant appears in an action when he answers, files a motion, or gives the plaintiff written notice of his appearance or when an attorney gives notice of appearance for him or has such appearance entered in open court. After appearance, a defendant or his attorney is entitled to notice of all subsequent proceedings of which notice is required to be given.

History: En. Sec. 494, p. 232, L. 1867; re-en. Sec. 574, p. 152, Cod. Stat. 1871; re-en. Sec. 478, p. 167, L. 1877; re-en. Sec. 478, 1st Div. Rev. Stat. 1879; re-en. Sec. 491, 1st Div. Comp. Stat. 1887; amd. Sec. 1834, C. Civ. Proc. 1895; re-en. Sec. 7149, Rev. C. 1907; re-en. Sec. 9782, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1014; re-en. Sec. 9782, R.C.M. 1935; amd. Sec. 1, Ch. 4, L. 1963; R.C.M. 1947, 93-8505.

25-3-402. Persons to be served. When a plaintiff or a defendant who has appeared resides out of this state and has no attorney in the action or proceeding, the service may be made on the clerk for him. But in all cases where a party has an attorney in the action or proceeding, the service of papers, when required, must be upon the attorney instead of the party, except of subpoenas, writs, and other process issued in the suit and papers to bring him into contempt.

History: En. Sec. 495, p. 232, L. 1867; re-en. Sec. 575, p. 153, Cod. Stat. 1871; re-en. Sec. 479, p. 168, L. 1877; re-en. Sec. 479, 1st Div. Rev. Stat. 1879; re-en. Sec. 492, 1st Div. Comp. Stat. 1887; re-en. Sec. 1835, C. Civ. Proc. 1895; re-en. Sec. 7150, Rev. C. 1907; re-en. Sec. 9783, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1015; re-en. Sec. 9783, R.C.M. 1935; R.C.M. 1947, 93-8506.

Part 5

Alternative Methods of Service

25-3-501. Service of telephonic or telegraphic copy. (1) Any summons, writ, or order in any civil action or proceeding and all other papers requiring service may be transmitted by telegraph or telephone for such service in any place; and the telegraphic or telephonic copy of such writ, order, or paper so transmitted may be served or executed by the officer or person to whom it is sent for that purpose and returned by him, if any return be requisite, in the same manner and with the same force and effect in all respects as the original thereof might be delivered to him; and the officer or person serving or executing the same has the same authority and is subject to the same liabilities as if the copy were the original.

(2) The original, when a writ or order, must also be filed in the court from which it was issued, and a certified copy thereof must be preserved in the telegraph or telephone office from which it is sent. In sending it, either the original or certified copy may be used by the operator for that purpose. Whenever any document to be sent by telegraph or telephone bears a seal, either private or official, it is not necessary for the operator, in sending the same, to telegraph or telephone a description of the seal or any words or device thereon, but the same may be expressed in the telegraphic or telephonic copy by the letters "L.S." or by the word "seal".

History: En. Sec. 1837, C. Civ. Proc. 1895; re-en. Sec. 7152, Rev. C. 1907; re-en. Sec. 9785, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1017; re-en. Sec. 9785, R.C.M. 1935; R.C.M. 1947, 93-8508.

25-3-502. Publication to be once a week. Where not otherwise expressly prescribed by law, all rules, orders, and decrees of court, summonses, and notices of all kinds, whether given by any court, judge, or clerk thereof or by any other officer, board, or commission, which by the laws of this state are required to be published in any newspaper shall be published once a week during the time prescribed by law for publication thereof, whether such publication be made in a weekly, semiweekly, triweekly, or daily newspaper.

History: En. Sec. 1, Ch. 104, L. 1917; re-en. Sec. 9833, R.C.M. 1921; re-en. Sec. 9833, R.C.M. 1935; R.C.M.1947, 93-8718.

25-3-503. What suffices as once a week. Whenever any statute of Montana requires the publication of any notice, order, or other paper or document in any newspaper once a week for any specified number of weeks, it shall be sufficient to so publish the same once each week for such number of times as shall equal the number of weeks so designated.

History: En. Sec. 1, Ch. 76, L. 1929; re-en. Sec. 9833.1, R.C.M. 1935; R.C.M. 1947, 93-8719.

25-3-504. Designating unknown persons as defendants. (1) In all actions or proceedings to obtain title or possession, for partition, for sale, for foreclosure of any encumbrance, for enforcement of any trust, for specific performance of any contract, to quiet title, or for any other disposition of any property, real, personal, or mixed, situate within the state of Montana, ncluding choses in action either situate within or due or claimed to be due rom persons, firms, or corporations resident within the state of Montana, persons whose names are unknown to plaintiff may be made parties defendant, either on the filing of the complaint, cross complaint, or complaint in intervention, as the case may be, or at any time thereafter by amendment thereof, by the name and description of unknown owners, unknown heirs, or unknown devisees of any deceased person or by all of such designations.

(2) (a) When persons are made parties defendant by the designation of unknown owners, it shall not be necessary to add to such designation in the title of the action a description of the property involved, whether real, personal, or mixed, including choses in action as aforesaid, of which such persons are claimed or supposed to be unknown owners or claimants or parties n interest, but a description of the property involved shall be included in the body of the summons for publication in the action.

(b) When persons are made defendant by the style and description of unknown heirs, there shall be added to such designation of them the name of the deceased person of whom they shall be claimed or supposed to be the heirs.

(c) When persons are made defendant by the style and description of unknown devisees, there shall be added to such designation the name of the deceased person of whom they shall be claimed or supposed to be devisees.

History: En. Sec. 1, Ch. 105, L. 1941; amd. Sec. 1, Ch. 179, L. 1943; R.C.M. 1947, 93-2819.

25-3-505. Effect of service by publication upon unknown persons. Judgments and decrees rendered in actions or proceedings when persons have been so made parties and served by publication of summons shall have the same effect in all respects as if such persons had been made parties by their own proper names and had been served by publication and mailing of summons according to the rules of civil procedure. If in such action or proceeding persons are made parties by the designation of:

(1) unknown heirs, the judgment or decree shall be conclusive as to all heirs of such deceased party;

(2) unknown devisees, the judgment or decree in such proceedings shall be conclusive as against all devisees of such deceased person;

(3) unknown owners, the judgment or decree rendered in such action or proceeding shall be conclusive as against the world, including all contingent interests in the controversy and persons not in being who may have an interest or contingent interest therein.

History: **En. Sec. 2, Ch. 105, L. 1941; R.C.M. 1947, 93-2820.**

Part 6

Service on Secretary of State — Nonresident Motorists

25-3-601. Conditional granting of use of highways to nonresidents. Subject to a compliance with the motor vehicle laws of this state and the acceptance of the provisions of this part and 25-10-206, nonresident owners and operators of motor vehicles hereby are granted the privilege of using the highways, roads, and streets of this state and its political subdivisions, and the use of such highways, roads, and streets shall be deemed and construed to be an acceptance of the provisions of this part and 25-10-206.

History: **En. Sec. 1, Ch. 10, L. 1937; R.C.M. 1947, 53-201.**

25-3-602. Operation of vehicle considered consent to service on secretary of state. The acceptance by a nonresident of the rights and privileges conferred by the laws of this state to use the highways, roads, and streets of the state and its political subdivisions, as evidenced by his operating a motor vehicle thereon, shall be deemed equivalent to and construed to be an appointment by such nonresident of the secretary of state of the state of Montana to be his true and lawful attorney upon whom may be served all lawful summonses and processes against him growing out of any accident, collision, or liability in which said nonresident may be involved while operating a motor vehicle upon such highways, roads, and streets; and said acceptance or operation shall be a signification of his agreement that any summons or process against him which is so served shall be of the same legal force and validity as if served on him personally within the state of Montana.

History: **En. Sec. 2, Ch. 10, L. 1937; R.C.M. 1947, 53-202.**

25-3-603. Operation of vehicle by agent. The operation by any person, by himself or his agent, of any motor vehicle, whether registered or unregistered and with or without a license to operate, on any public way in this state shall be deemed equivalent to an appointment by such person of the secretary of state or his successor in office to be his true and lawful attorney upon whom may be served all lawful processes in any action or proceeding against him growing out of an accident or collision in which he or his agent may be involved while operating a motor vehicle on any public way in this state; and such operation shall be a signification of an agreement by uch person that any such process against him which is served upon the ecretary of state or his successor in office shall be of the same force and alidity as if served upon him personally. This section shall not apply in case f any cause of action, for the service of process in which provision is made y 25-3-602, nor shall it authorize service of process upon any person who nay with due diligence be found and personally served with process within he state of Montana.

History: **En. Sec. 3, Ch. 10, L. 1937; R.C.M. 1947, 53-203.**

25-3-604. Secretary of state's record of process served. The ecretary of state shall keep a record of all such summonses and process, vhich shall show the day of service.

History: **En. Sec. 6, Ch. 10, L. 1937; R.C.M. 1947, 53-206.**

CHAPTER 4

PLEADINGS, MOTIONS, AND OTHER PAPERS

Part 1 — General Provisions

Section

25-4-101. Motions and orders when judge absent.
25-4-102. Transfer when judge unable to hear motion or return of order.
25-4-103. Vacating or modifying order made without notice.
Sections 25-4-104 through 25-4-110 reserved.
25-4-111. Lost papers.
25-4-112. Papers with technical defects.

Part 2 — Pleadings in General

25-4-201. Description of real property in complaint.
25-4-202. Copy of written instrument in pleading.
25-4-203. Verification of pleadings.
25-4-204. Time for amendment or reply after motion on pleading.

Part 3 — Pleading Special Matters

25-4-301. Pleading statute of limitations.
25-4-302. Pleading an account.
25-4-303. True value of property — action for taking.
Sections 25-4-304 through 25-4-310 reserved.
25-4-311. Damages for personal injury or wrongful death not to be stated.
25-4-312. Request for statement of damages — response.
25-4-313. Notice to defendant when no request for statement.
25-4-314. Permissive delivery of statement with summons.

Part 4 — Counterclaim and Cross-Claim

25-4-401. Counterclaim by person sued in representative capacity.
25-4-402. Counterclaim against person suing in representative capacity.
25-4-403. Counterclaim in action on contract.
25-4-404. Cross-claim to be asserted in answer.

Part 5 — Motion to Postpone Trial

25-4-501. Motion to postpone trial for absence of testimony.
25-4-502. No postponement when expected evidence admitted.
25-4-503. Postponement on other grounds.

25-4-504. Depositions of witnesses upon postponement.

Part 6 — Procedure After Claims Partially Admitted

25-4-601. Procedure when answer admits part of plaintiff's claim.
25-4-602. Judgment for excess when plaintiff admits counterclaim.

Part 1

General Provisions

25-4-101. Motions and orders when judge absent. (1) Motions must be made in the county in which the action is brought or in any adjoining county in the same district. In case of the absence of the judge of the district from his district or in an action pending in which such judge is disqualified to act, such motion may be made before the judge of any adjoining district, provided there is another judge in the same district who is not disqualified to act, in which case such motion shall be made before another judge in the same district.

(2) Orders made out of court may be made by the judge of the court in any part of the state.

History: En. Sec. 418, p. 128, Bannack Stat.; re-en. Sec. 487, p. 231, L. 1867; amd. Sec. 567, p. 151, Cod. Stat. 1871; amd. Sec. 470, p. 166, L. 1877; re-en. Sec. 470, 1st Div. Rev. Stat. 1879; re-en. Sec. 483, 1st Div. Comp. Stat. 1887; re-en. Sec. 1821, C. Civ. Proc. 1895; re-en. Sec. 7140, Rev. C. 1907; re-en. Sec. 9773, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1004; re-en. Sec. 9773, R.C.M. 1935; R.C.M. 1947, 93-8402.

25-4-102. Transfer when judge unable to hear motion or return of order. When a notice of motion is given or an order to show cause is made returnable before a judge out of court and, at the time fixed for the motion or on the return day of the order, the judge is unable to hear the parties, the matter may be transferred by his order to some other judge.

History: En. Sec. 420, p. 129, Bannack Stat.; re-en. Sec. 489, p. 231, L. 1867; re-en. Sec. 569, p. 152, Cod. Stat. 1871; re-en. Sec. 472, p. 166, L. 1877; re-en. Sec. 472, 1st Div. Rev. Stat. 1879; re-en. Sec. 485, 1st Div. Comp. Stat. 1887; amd. Sec. 1823, C. Civ. Proc. 1895; re-en. Sec. 7142, Rev. C. 1907; re-en. Sec. 9775, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1006; re-en. Sec. 9775, R.C.M. 1935; R.C.M. 1947, 93-8404.

25-4-103. Vacating or modifying order made without notice. An order made out of court without notice to the adverse party may be vacated or modified, without notice, by the judge who made it, or it may be vacated or modified on notice in the manner in which other motions are made.

History: En. Sec. 249, p. 94, Bannack Stat.; re-en. Sec. 318, p. 199, L. 1867; re-en. Sec. 367, p. 107, Cod. Stat. 1871; re-en. Sec. 406, p. 149, L. 1877; re-en. Sec. 406, 1st Div. Rev. Stat. 1879; re-en. Sec. 419, 1st Div. Comp. Stat. 1887; re-en. Sec. 1824, C. Civ. Proc. 1895; re-en. Sec. 7143, Rev. C. 1907; re-en. Sec. 9776, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 937; re-en. Sec. 9776, R.C.M. 1935; R.C.M. 1947, 93-8405.

25-4-104 through 25-4-110 reserved.

25-4-111. Lost papers. If an original pleading or paper be lost, the court may authorize a copy thereof to be filed and used instead of the original.

History: En. Sec. 1891, C. Civ. Proc. 1895; re-en. Sec. 7184, Rev. C. 1907; re-en. Sec. 9817, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1045; re-en. Sec. 9817, R.C.M. 1935; R.C.M. 1947, 93-8702.

25-4-112. Papers with technical defects. An affidavit, notice, or other paper without the title of the action or proceeding in which it is made or with a defective title is as valid and effectual for any purpose as if duly entitled if it intelligibly refers to such action or proceeding.

History: En. Sec. 424, p. 129, Bannack Stat.; re-en. Sec. 502, p. 233, L. 1867; re-en. Sec. 579, p. 153, Cod. Stat. 1871; re-en. Sec. 520, p. 177, L. 1877; re-en. Sec. 520, 1st Div. Rev. Stat. 1879; re-en. Sec. 537, 1st Div. Comp. Stat. 1887; re-en. Sec. 1892, C. Civ. Proc. 1895; re-en. Sec. 7185, Rev. C. 1907; re-en. Sec. 9818, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1046; re-en. Sec. 9818, R.C.M. 1935; R.C.M. 1947, 93-8703.

Part 2

Pleadings in General

25-4-201. Description of real property in complaint. In an action for the recovery of real property, it must be described in the complaint with such certainty as to enable an officer, upon execution, to identify it.

History: En. Sec. 100, p. 64, L. 1877; re-en. Sec. 100, 1st Div. Rev. Stat. 1879; re-en. Sec. 102, 1st Div. Comp. Stat. 1887; re-en. Sec. 744, C. Civ. Proc. 1895; re-en. Sec. 6570, Rev. C. 1907; re-en. Sec. 9168, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 455; re-en. Sec. 9168, R.C.M. 1935; R.C.M. 1947, 93-3805.

25-4-202. Copy of written instrument in pleading. The insertion in a pleading of a copy of a written instrument is equivalent to setting forth the instrument according to its legal effect.

History: En. Sec. 748, C. Civ. Proc. 1895; re-en. Sec. 6574, Rev. C. 1907; re-en. Sec. 9172, R.C.M. 1921; re-en. Sec. 9172, R.C.M. 1935; R.C.M. 1947, 93-3809.

25-4-203. Verification of pleadings. (1) In any case in which an affidavit of verification is required, except as otherwise specifically provided, such affidavit of verification must be to the effect that the pleading is true to the knowledge of the deponent, except as to the matters therein stated on information and belief, and that as to those he believes it to be true. Such verification must be made by the party or, if there are several parties united in interest or pleading, by one at least of such parties acquainted with the facts if such party is in the county and capable of making the affidavit. The verification may also be made by the agent or attorney of the party if the party is absent from the county where the attorney resides or is from any other cause unable to verify the pleading, and in such case the verification must state that the deponent is the agent or attorney of the party, the reason why such verification is made by such agent or attorney, and that the matters stated in the pleadings are true to the best knowledge, information, and belief of such agent or attorney.

(2) When a corporation is a party, the verification may be made by any officer thereof and must state what officer he is and that the matters stated therein are true to the best knowledge, information, and belief of such officer. If there is no officer of the corporation within the county, the verification may be made by its attorney.

History: En. Sec. 55, p. 144, L. 1867; amd. Sec. 9, p. 64, L. 1869; amd. Sec. 63, p. 39, Cod. Stat. 1871; re-en. Sec. 94, p. 62, L. 1877; re-en. Sec. 94, 1st Div. Rev. Stat. 1879; re-en. Sec. 96, 1st Div. Comp. Stat. 1887; en. Sec. 731, C. Civ. Proc. 1895; re-en. Sec. 6565, Rev. C. 1907; re-en. Sec. 9163, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 446; re-en. Sec. 9163, R.C.M. 1935; amd. Sec. 1, Ch. 15, L. 1963; R.C.M. 1947, 93-3702.

25-4-204. Time for amendment or reply after motion on pleading. When a demurrer or motion to any pleading is sustained or overruled and time to amend, answer, or reply is given, the time so given runs from service of notice of the decision or order, except when the party against whom the decision is made is in court. In such case the time runs from the making of the decision or order.

History: En. Sec. 779, C. Civ. Proc. 1895; re-en. Sec. 6594, Rev. C. 1907; re-en. Sec. 9192, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 476; re-en. Sec. 9192, R.C.M. 1935; amd. Sec. 2, Ch. 8, L. 1937; R.C.M. 1947, 93-3910.

Part 3

Pleading Special Matters

25-4-301. Pleading statute of limitations. In pleading the statute of limitations, it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section .... (giving the number of the section and subsection thereof, if it is so divided, relied upon). If such allegation be controverted, the party pleading must establish, on the trial, the facts showing that the cause of action is so barred.

History: En. Sec. 103, p. 64, L. 1877; re-en. Sec. 103, 1st Div. Rev. Stat. 1879; re-en. Sec. 105, 1st Div. Comp. Stat. 1887; re-en. Sec. 749, C. Civ. Proc. 1895; re-en. Sec. 6575, Rev. C. 1907; re-en. Sec. 9173, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 458; re-en. Sec. 9173, R.C.M. 1935; R.C.M. 1947, 93-3810.

25-4-302. Pleading an account. It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within 5 days or such further time as the court may allow or may be agreed to by the parties, after a demand thereof in writing, a copy of the account or be precluded from giving evidence thereof. The court or judge thereof may order a further account when the one delivered is too general or is defective in any particular.

History: En. Sec. 55, p. 53, Bannack Stat.; amd. Sec. 56, p. 145, L. 1867; re-en. Sec. 64, p. 40, Cod. Stat. 1871; re-en. Sec. 99, p. 64, L. 1877; re-en. Sec. 99, 1st Div. Rev. Stat. 1879; re-en. Sec. 101, 1st Div. Comp. Stat. 1887; amd. Sec. 743, C. Civ. Proc. 1895; re-en. Sec. 6569, Rev. C. 1907; re-en. Sec. 9167, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 454; re-en. Sec. 9167, R.C.M. 1935; R.C.M. 1947, 93-3804.

25-4-303. True value of property — action for taking. When, in an action to recover the possession of personal property, the person making any affidavit did not truly state the value of the property and the officer taking the property or the sureties on any bond or undertaking are sued for taking the same, the officer or sureties may, in their answer, set up the true value of the property and that the person in whose behalf said affidavit was made was entitled to the possession of the same when said affidavit was made or that the value in the affidavit stated was inserted by mistake, whereupon the court must disregard the value as stated in the affidavit.

History: En. Sec. 115, p. 67, L. 1877; re-en. Sec. 115, 1st Div. Rev. Stat. 1879; re-en. Sec. 117, 1st Div. Comp. Stat. 1887; amd. Sec. 775, C. Civ. Proc. 1895; re-en. Sec. 6590, Rev. C. 1907; re-en. Sec. 9188, R.C.M. 1921; re-en. Sec. 9188, R.C.M. 1935; R.C.M. 1947, 93-3906.

25-4-304 through 25-4-310 reserved.

25-4-311. Damages for personal injury or wrongful death not o be stated. In an action for the recovery of money or damages for personal injury or wrongful death, the amount thereof may not be stated in the laim for relief, whether an original claim, counterclaim, cross-claim, or third-arty claim.

History: En. 93-2721 by Sec. 1, Ch. 525, L. 1977; R.C.M. 1947, 93-2721.

25-4-312. Request for statement of damages — response. When n action is filed in the district court to recover damages for personal injury r wrongful death, the parties against whom the action is brought may at any ime request a statement setting forth the nature and amount of damages eing sought. The request shall be filed and served upon the claimant, who hall file and serve a responsive statement as to damages within 15 days hereafter. In the event that a response is not served, the party, on notice o the claimant, may petition the court in which the action is pending to rder the claimant to serve a responsive statement.

History: En. 93-2722 by Sec. 2, Ch. 525, L. 1977; R.C.M. 1947, 93-2722.

25-4-313. Notice to defendant when no request for statement. f no request is made for such a statement setting forth the nature and mount of damages being sought, the claimant shall give notice to the defendant of the amount of special and general damages sought to be recovered:

(1) before a default may be taken; or

(2) in the event an answer is filed, at least 45 days prior to the date set or the trial.

History: En. 93-2723 by Sec. 3, Ch. 525, L. 1977; R.C.M. 1947, 93-2723.

25-4-314. Permissive delivery of statement with summons. A copy of the statement setting forth the nature and amount of damages being sought may be delivered to the defendant at the time of service of the summons and complaint but may not be filed for 20 days after the complaint is filed.

History: En. 93-2724 by Sec. 4, Ch. 525, L. 1977; R.C.M. 1947, 93-2724.

Part 4

Counterclaim and Cross-Claim

25-4-401. Counterclaim by person sued in representative capacity. In an action against an executor or administrator or other person sued in a representative capacity, the defendant may set forth as a counterclaim a demand belonging to the decedent or other person whom he represents where the person so represented would have been entitled to set forth the same in an action against him.

History: En. Sec. 695, C. Civ. Proc. 1895; re-en. Sec. 6545, Rev. C. 1907; re-en. Sec. 9142, R.C.M. 1921; re-en. Sec. 9142, R.C.M. 1935; R.C.M. 1947, 93-3406.

25-4-402. Counterclaim against person suing in representative capacity. In an action brought by an executor or administrator in his representative capacity, a demand against the decedent belonging at the time of his death to the defendant may be set forth by the defendant as a counterclaim as if the action had been brought by the decedent in his lifetime, and if a balance is found to be due the defendant, judgment must be rendered therefor against the plaintiff in his representative capacity. Execution can be issued upon such a judgment only in a case where it could be issued upon a judgment in an action against the executor or administrator.

History: En. Sec. 696, C. Civ. Proc. 1895; re-en. Sec. 6546, Rev. C. 1907; re-en. Sec. 9143, R.C.M. 1921; re-en. Sec. 9143, R.C.M. 1935; R.C.M. 1947, 93-3407.

25-4-403. Counterclaim in action on contract. A counterclaim on a contract is subject to the following rules:

(1) Except as otherwise provided by the Uniform Commercial Code, if the action is founded upon a contract which has been assigned by the party thereto, a demand existing against the party thereto or an assignee of the contract at the time of the assignment thereof and belonging to the defendant, in good faith, before notice of the assignment must be allowed as a counterclaim to the amount of the plaintiff's demand if it might have been so allowed against the party or the assignee while the contract belonged to him.

(2) If the plaintiff is a trustee for another or if the action is in the name of the plaintiff who has no actual interest in the contract upon which it is founded, a demand against the plaintiff shall not be allowed as a counterclaim, but so much of a demand existing against the person whom he represents or for whose benefit the action is brought as will satisfy the plaintiff's demand must be allowed as a counterclaim if it might have been so allowed in an action brought by the person beneficially interested.

History: En. Sec. 692, C. Civ. Proc. 1895; re-en. Sec. 6542, Rev. C. 1907; re-en. Sec. 9139, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 438; re-en. Sec. 9139, R.C.M. 1935; amd. Sec. 11-158, Ch. 264, L. 1963; R.C.M. 1947, 93-3403.

25-4-404. Cross-claim to be asserted in answer. Where the judgment may determine the ultimate rights of two or more defendants as between themselves, a defendant who requires such a determination must demand it in his answer. The controversy between the defendants must not delay a judgment to which the plaintiff is entitled unless the court otherwise directs.

History: En. Sec. 753, C. Civ. Proc. 1895; re-en. Sec. 6579, Rev. C. 1907; re-en. Sec. 9177, R.C.M. 1921; re-en. Sec. 9177, R.C.M. 1935; R.C.M. 1947, 93-3814.

Part 5

Motion to Postpone Trial

25-4-501. Motion to postpone trial for absence of testimony. A motion to postpone a trial on grounds of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained and that due diligence has been used to procure it.

History: En. Sec. 130, p. 69, Bannack Stat.; re-en. Sec. 158, p. 163, L. 1867; en. Sec. 194, p. 65, Cod. Stat. 1871; re-en. Sec. 244, p. 98, L. 1877; re-en. Sec. 244, 1st Div. Rev. Stat. 1879; re-en. Sec. 253, 1st Div. Comp. Stat. 1887; re-en. Sec. 1039, C. Civ. Proc. 1895; re-en. Sec. 6729, Rev. C. 1907; re-en. Sec. 9332, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 595; re-en. Sec. 9332, R.C.M. 1935; R.C.M. 1947, 93-4910(part).

25-4-502. No postponement when expected evidence admitted. The court may also require the moving party to state, upon affidavit, the evidence which he expects to obtain, and if the adverse party thereupon admits that such evidence would be given and that it be considered as actually given on the trial or offered and overruled as improper, the trial shall not be postponed.

History: En. Sec. 130, p. 69, Bannack Stat.; re-en. Sec. 158, p. 163, L. 1867; en. Sec. 194, p. 65, Cod. Stat. 1871; re-en. Sec. 244, p. 98, L. 1877; re-en. Sec. 244, 1st Div. Rev. Stat. 1879; re-en. Sec. 253, 1st Div. Comp. Stat. 1887; re-en. Sec. 1039, C. Civ. Proc. 1895; re-en. Sec. 6729, Rev. C. 1907; re-en. Sec. 9332, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 595; re-en. Sec. 9332, R.C.M. 1935; R.C.M. 1947, 93-4910(part).

25-4-503. Postponement on other grounds. Upon terms the court may, in its discretion, upon good cause shown and in furtherance of justice, postpone a trial or proceeding upon other grounds than the absence of evidence.

History: En. Sec. 130, p. 69, Bannack Stat.; re-en. Sec. 158, p. 163, L. 1867; en. Sec. 194, p. 65, Cod. Stat. 1871; re-en. Sec. 244, p. 98, L. 1877; re-en. Sec. 244, 1st Div. Rev. Stat. 1879; re-en. Sec. 253, 1st Div. Comp. Stat. 1887; re-en. Sec. 1039, C. Civ. Proc. 1895; re-en. Sec. 6729, Rev. C. 1907; re-en. Sec. 9332, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 595; re-en. Sec. 9332, R.C.M. 1935; R.C.M. 1947, 93-4910(part).

25-4-504. Depositions of witnesses upon postponement. The party obtaining a postponement of a trial in any court of record must, if required by the adverse party, consent that the testimony of any witness of such adverse party who is in attendance be then taken by deposition before a judge or clerk of the court in which the case is pending or before such notary public as the court may indicate, which must accordingly be done, and the testimony so taken may be read on the trial with the same effect and subject to the same objections as if the witnesses were produced.

History: En. Sec. 447, p. 133, Bannack Stat.; re-en. Sec. 604, p. 158, Cod. Stat. 1871; re-en. Sec. 245, p. 99, L. 1877; re-en. Sec. 245, 1st Div. Rev. Stat. 1879; re-en. Sec. 254, 1st Div. Comp. Stat. 1887; amd. Sec. 1040, C. Civ. Proc. 1895; re-en. Sec. 6730, Rev. C. 1907; re-en. Sec. 9333, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 596; re-en. Sec. 9333, R.C.M. 1935; R.C.M. 1947, 93-4911.

Part 6

Procedure After Claims Partially Admitted

25-4-601. Procedure when answer admits part of plaintiff's claim. Where the answer of the defendant, expressly or by not denying, admits a part of the plaintiff's claim to be just, the court, upon the plaintiff's motion, may, in its discretion, order that the action be severed, that a judgment be entered for the plaintiff for the part so admitted, and if the plaintiff so elects, that the action be continued with like effect as to the subsequent proceedings as if it had been originally brought for the remainder of the claim. The order must prescribe the time and manner of the plaintiff's election. If the plaintiff elects to continue the action, his right to costs upon the judgment is the same as if it were taken in an action brought for only that part of the claim. If the plaintiff does not elect to continue the action, costs must be awarded as upon final judgment in any other case.

History: En. Sec. 702, C. Civ. Proc. 1895; re-en. Sec. 6552, Rev. C. 1907; re-en. Sec. 9149, R.C.M. 1921; re-en. Sec. 9149, R.C.M. 1935; R.C.M. 1947, 93-3413.

25-4-602. Judgment for excess when plaintiff admits counterclaim. In an action upon contract where the complaint demands judgment for a sum of money only, if the defendant by his answer does not deny the plaintiff's claim but sets up a counterclaim amounting to less than the plaintiff's claim, the plaintiff, upon filing with the clerk an admission of the counterclaim, may take judgment for the excess, as upon a default for want of an answer. The admission must be made a part of the judgment roll.

History: En. Sec. 703, C. Civ. Proc. 1895; re-en. Sec. 6553, Rev. C. 1907; re-en. Sec. 9150, R.C.M. 1921; re-en. Sec. 9150, R.C.M. 1935; R.C.M. 1947, 93-3414.

CHAPTER 5

PARTIES

Part 1 — Designation of Parties

Section
25-5-101. Names of parties.
25-5-102. Use of abbreviated names.
25-5-103. Suing a party by a fictitious name.
25-5-104. Action against business association.

Part 2 — Capacity to Be a Party—Joinder

25-5-201. Capacity of married person to be a party.
25-5-202. Who may defend when spouse sued.
25-5-203. Defendants — adverse claims to real property.
25-5-204. Joinder of state as defendant in actions affecting title to property.

Part 3 — Guardian ad Litem

25-5-301. Appointment of guardian.

Part 1

Designation of Parties

25-5-101. Names of parties. In a civil action, the party complaining is known as the plaintiff and the adverse party as the defendant. The party prosecuting a special proceeding may be known as the plaintiff and the adverse party as the defendant.

History: Ap. p. Sec. 2, p. 43, Bannack Stat.; re-en. Sec. 2, p. 136, L. 1867; re-en. Sec. 2, p. 28, Cod. Stat. 1871; re-en. Sec. 2, p. 40, L. 1877; re-en. Sec. 2, 1st Div. Rev. Stat. 1879; re-en. Sec. 2, 1st Div. Comp. Stat. 1887; re-en. Sec. 461, C. Civ. Proc. 1895; re-en. Sec. 6426, Rev. C. 1907; re-en. Sec. 9009, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 308; re-en. Sec. 9009, R.C.M. 1935; Sec. 93-2302, R.C.M. 1947; Ap. p. Sec. 1930, C. Civ. Proc. 1895; re-en. Sec. 7200, Rev. C. 1907; re-en. Sec. 9834, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1063; re-en. Sec. 9834, R.C.M. 1935; Sec. 93-8801, R.C.M. 1947; R.C.M. 1947, 93-2302, 93-8801.

25-5-102. Use of abbreviated names. It is sufficient in all actions, papers, pleadings, or proceedings to designate any party or person by the initial letter or letters or some contraction of the first name or names, instead of stating the first name in full.

History: En. Sec. 68, p. 55, Bannack Stat.; re-en. Sec. 69, p. 147, L. 1867; re-en. Sec. 77, p. 42, Cod. Stat. 1871; re-en. Sec. 116, p. 67, L. 1877; re-en. Sec. 116, 1st Div. Rev. Stat. 1879; en. Sec.

1, p. 55, L. 1885; re-en. Sec. 118, 1st Div. Comp. Stat. 1887; re-en. Sec. 777, C. Civ. Proc. 1895; re-en. Sec. 6592, Rev. C. 1907; re-en. Sec. 9190, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 474; re-en. Sec. 9190, R.C.M. 1935; R.C.M. 1947, 93-3908(part).

25-5-103. Suing a party by a fictitious name. When the plaintiff is ignorant of the name of the defendant, such defendant may be designated in any pleading or proceeding by any name; and when his true name is discovered, the pleadings or proceedings may be amended accordingly.

History: En. Sec. 68, p. 55, Bannack Stat.; re-en. Sec. 69, p. 147, L. 1867; re-en. Sec. 77, p. 42, Cod. Stat. 1871; re-en. Sec. 116, p. 67, L. 1877; re-en. Sec. 116, 1st Div. Rev. Stat. 1879; en. Sec. , p. 55, L. 1885; re-en. Sec. 118, 1st Div. Comp. Stat. 1887; re-en. Sec. 777, C. Civ. Proc. 1895; re-en. Sec. 6592, Rev. C. 1907; re-en. Sec. 9190, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 474; re-en. Sec. 9190, R.C.M. 1935; R.C.M. 1947, 93-3908(part).

25-5-104. Action against business association. When two or more persons associated in any business transact such business under a common name, whether it comprise the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates in the same manner as if all had been named defendants and had been sued upon their joint liability.

History: En. Sec. 439, p. 132, Bannack Stat.; re-en. Sec. 596, p. 157, Cod. Stat. 1871; amd. Sec. 5, p. 44, L. 1877; re-en. Sec. 25, 1st Div. Rev. Stat. 1879; re-en. Sec. 25, 1st Div. Comp. Stat. 1887; re-en. Sec. 590, C. Civ. Proc. 1895; re-en. Sec. 6497, Rev. C. 1907; re-en. Sec. 9089, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 388; re-en. Sec. 9089, R.C.M. 1935; R.C.M. 1947, 93-2827.

Part 2

Capacity to Be a Party — Joinder

25-5-201. Capacity of married person to be a party. A married person may sue and be sued in the same manner as if such person were sole.

History: En. Sec. 7, 1st Div. Comp. Stat. 1887; re-en. Sec. 572, C. Civ. Proc. 1895; re-en. Sec. 6479, Rev. C. 1907; re-en. Sec. 9069, R.C.M. 1921; re-en. Sec. 9069, R.C.M. 1935; amd. Sec. 48, Ch. 535, L. 1975; R.C.M. 1947, 93-2803.

25-5-202. Who may defend when spouse sued. If a husband and wife be sued together, each spouse may defend for his or her own right, and if the other spouse neglect to defend, the spouse who does choose to defend may defend for the other spouse's right also.

History: En. Sec. 8, p. 44, Bannack Stat.; re-en. Sec. 8, p. 136, L. 1867; re-en. Sec. 8, p. 28, Cod. Stat. 1871; amd. Sec. 8, p. 41, L. 1877; re-en. Sec. 8, 1st Div. Rev. Stat. 1879; re-en. Sec. 8, 1st Div. Comp. Stat. 1887; re-en. Sec. 573, C. Civ. Proc. 1895; re-en. Sec. 6480, Rev. C. 1907; re-en. Sec. 9070, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 371; re-en. Sec. 9070, R.C.M. 1935; amd. Sec. 49, Ch. 535, L. 1975; R.C.M. 1947, 93-2804.

25-5-203. Defendants — adverse claims to real property. In an action brought by a person out of possession of real property to determine an adverse claim of an interest or estate therein, the person making such adverse claim and the persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises as against the defendants in the action against whom the judgment has passed.

History: En. Sec. 17, p. 42, L. 1877; re-en. Sec. 17, 1st Div. Rev. Stat. 1879; re-en. Sec. 17, 1st Div. Comp. Stat. 1887; re-en. Sec. 582, C. Civ. Proc. 1895; re-en. Sec. 6489, Rev. C. 1907; re-en. Sec. 9081, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 380; re-en. Sec. 9081, R.C.M. 1935; R.C.M. 1947, 93-2817.

25-5-204. Joinder of state as defendant in actions affecting title to property. In any action or proceeding brought in any district court of the state affecting the title to real or personal property in which the state has or claims to have an interest or claim, the state may be made a party defendant to such action or proceeding and its rights or interests adjudicated

History: En. Sec. 1, Ch. 210, L. 1921; re-en. Sec. 9079, R.C.M. 1921; amd. Sec. 1, Ch. 65, L 1931; re-en. Sec. 9079, R.C.M. 1935; amd. Sec. 8, Ch. 234, L. 1977; R.C.M. 1947, 93-2815.

Part 3

Guardian ad Litem

25-5-301. Appointment of guardian. When a guardian ad litem is appointed by the court, he must be appointed as follows:

(1) when the infant is plaintiff, upon the application of the infant if he be of the age of 14 years or, if under that age, upon the application of a relative or friend of the infant;

(2) when the infant is defendant, upon the application of the infant if he be of the age of 14 years and apply within 10 days after the service of the summons or, if under that age or if he neglects so to apply, upon the application of a relative or friend of the infant or of any other party to the action;

(3) when an insane or incompetent person is party to an action or proceeding, upon the application of a relative or friend of such insane or incompetent person or of any other party to the action or proceeding.

History: En. Sec. 10, p. 44, Bannack Stat.; re-en. Sec. 10, p. 136, L. 1867; re-en. Sec. 10, p. 28, Cod. Stat. 1871; re-en. Sec. 10, p. 41, L. 1877; re-en. Sec. 10, 1st Div. Rev. Stat. 1879; re-en. Sec. 10, 1st Div. Comp. Stat. 1887; re-en. Sec. 575, C. Civ. Proc. 1895; re-en. Sec. 6482, Rev. C. 1907; re-en. Sec. 9072, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 373; re-en. Sec. 9072, R.C.M. 1935; R.C.M. 1947, 93-2806.

Compiler's Comments

Obsolescence. The Code Commissioner's staff feels that this section should be repealed because it conflicts with Rule 17(c), M.R.Civ.P., and the subject matter is adequately covered by Rules 17(c) and 25(b).

CHAPTER 6

RESERVED

CHAPTER 7

TRIALS

Part 1 — Issues—Mode of Trial

Section

25-7-101. Issue defined, types of issues.
25-7-102. Issues of law to be decided by court.
25-7-103. When issues of fact to be decided by jury.
25-7-104. Mode of trial of counterclaim.

Part 2 — Selection of Jury

25-7-201. When a jury is to be selected.

5-7-202. Judge to draw capsules containing ballots.
5-7-203. Drawing a new jury when another is impaneled.
5-7-204. Mode of drawing capsules.
5-7-205. Persons drawn and approved to form jury.
5-7-206. Procedure when insufficient number attend.
5-7-207. Oath of jury.
5-7-208. Capsules containing ballots of jurors who have been sworn.
5-7-209. Capsules containing ballots of jurors not sworn.
5-7-210. Alternate jurors.
Sections 25-7-211 through 25-7-220 reserved.
5-7-221. Challenges to jurors and the jury.
5-7-222. Challenges to the array or panel.
5-7-223. Challenges to jurors for cause.
5-7-224. Peremptory challenges to jurors.

Part 3 — Order and Conduct of Trial by Jury

5-7-301. Order of trial.
5-7-302. Directed verdict when no issues of fact.
5-7-303. Activity of court during jury's absence.
5-7-304. Procedure when a juror becomes sick.
5-7-305. Procedure when jury prevented from giving verdict.

Part 4 — Conduct of Jury

5-7-401. View by jury of the premises.
5-7-402. Admonition when jury permitted to separate.
5-7-403. Conduct of jury after case submitted to it.
5-7-404. Papers which may be taken into jury room.
5-7-405. Jury's request for further information.

Part 5 — Jury's Verdict

5-7-501. Return of verdict — polling the jury.
5-7-502. Content of verdict — action or counterclaim for recovery of money.
5-7-503. Content of verdict — action for recovery of personal property.

Part 6 — Trial by the Court

5-7-601. Waiver of findings of fact.
5-7-602. Trial upon agreed statement of facts.

Part 7 — Referees

5-7-701. Oath of referee.
5-7-702. Grounds for objection to appointment of referee.
5-7-703. Procedure upon objection.

Part 1

Issues — Mode of Trial

25-7-101. Issue defined, types of issues. Issues arise upon the pleadings when a fact or conclusion of law is maintained by the one party and is controverted by the other. They are of two kinds:

(1) of law; and

(2) of fact.

History: En. Sec. 123, p. 68, Bannack Stat.; re-en. Sec. 151, p. 163, L. 1867; re-en. Sec. 187, p. 64, Cod. Stat. 1871; re-en. Sec. 237, p. 98, L. 1877; re-en. Sec. 237, 1st Div. Rev. Stat. 1879; re-en.

Sec. 246, 1st Div. Comp. Stat. 1887; amd. Sec. 1030, C. Civ. Proc. 1895; re-en. Sec. 6720, Rev. C. 1907; re-en. Sec. 9323, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 588; re-en. Sec. 9323, R.C.M. 1935; R.C.M. 1947, 93-4901.

25-7-102. Issues of law to be decided by court. All questions of law, including the admissibility of testimony, the facts preliminary to such admission, the construction of statutes and other writings, and other rules of evidence, are to be decided by the court unless they are referred upon consent, and all discussions of law are to be addressed to the court.

History: Ap. p. Sec. 3441, C. Civ. Proc. 1895; re-en. Sec. 8055, Rev. C. 1907; re-en. Sec. 10699, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2102; re-en. Sec. 10699, R.C.M. 1935; Sec. 93-2501-2, R.C.M. 1947; Ap. p. Sec. 126, p. 68, Bannack Stat.; amd. Sec. 154, p. 163, L. 1867; re-en. Sec. 190, p. 64, Cod. Stat. 1871; re-en. Sec. 240, p. 98, L. 1877; re-en. Sec. 240, 1st Div. Rev. Stat. 1879; re-en. Sec. 249, 1st Div. Comp. Stat. 1887; re-en. Sec. 1032, C. Civ. Proc. 1895; re-en. Sec. 6722, Rev. C. 1907; re-en. Sec. 9325, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 591; re-en. Sec. 9325, R.C.M. 1935; Sec. 93-4903, R.C.M. 1947; R.C.M. 1947, 93-4903, 93-2501-2(part).

25-7-103. When issues of fact to be decided by jury. All questions of fact, where the trial is by jury, other than those mentioned in 25-7-102 are to be decided by the jury, and all evidence thereon is to be addressed to them, except when otherwise provided by this code.

History: En. Sec. 3440, C. Civ. Proc. 1895; re-en. Sec. 8054, Rev. C. 1907; re-en. Sec. 10698, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2101; re-en. Sec. 10698, R.C.M. 1935; R.C.M. 1947, 93-2501-1.

25-7-104. Mode of trial of counterclaim. Where the defendant interposes a counterclaim and thereupon demands an affirmative judgment against the plaintiff, the mode of trial of an issue of fact arising thereupon is the same as if it arose in an action brought by the defendant against the plaintiff for the cause of action stated in the counterclaim and demanding the same judgment.

History: En. Sec. 1036, C. Civ. Proc. 1895; re-en. Sec. 6726, Rev. C. 1907; re-en. Sec. 9329, R.C.M. 1921; re-en. Sec. 9329, R.C.M. 1935; R.C.M. 1947, 93-4907.

Part 2

Selection of Jury

25-7-201. When a jury is to be selected. The procedure in this part for selecting a jury must be pursued as often as an issue is brought to trial by a jury.

History: En. Sec. 1054, C. Civ. Proc. 1895; re-en. Sec. 6735, Rev. C. 1907; amd. Sec. 13, Ch. 35, L. 1919; re-en. Sec. 9338, R.C.M. 1921; re-en. Sec. 9338, R.C.M. 1935; R.C.M. 1947, 93-5005(part).

25-7-202. Judge to draw capsules containing ballots. When an issue of fact to be tried by a jury is brought to trial, the district judge in the presence of the clerk of the court must openly draw out of the trial juror box as many of the capsules containing ballots with the names of jurors thereon, one after another, as are sufficient to form a jury.

History: En. Sec. 1050, C. Civ. Proc. 1895; re-en. Sec. 6731, Rev. C. 1907; amd. Sec. 10, Ch. 35, L. 1919; re-en. Sec. 9334, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 600; re-en. Sec. 9334, R.C.M. 1935; amd. Sec. 3, Ch. 151, L. 1937; amd. Sec. 3, Ch. 3, L. 1939; R.C.M. 1947, 93-5001.

25-7-203. Drawing a new jury when another is impaneled. If an issue is brought to trial by a jury while a jury is impaneled in another cause and not then discharged, the court may order a jury for the trial of that issue to be drawn out of the box containing the capsules then undrawn; but in any other case the capsules containing the ballots with the names of all the trial jurors returned and attending the court must be placed together in the same box before a jury is drawn therefrom.

History: En. Sec. 1056, C. Civ. Proc. 1895; re-en. Sec. 6737, Rev. C. 1907; amd. Sec. 15, Ch. 35, L. 1919; re-en. Sec. 9340, R.C.M. 1921; re-en. Sec. 9340, R.C.M. 1935; R.C.M. 1947, 93-5007.

25-7-204. Mode of drawing capsules. Before the first capsule containing a ballot shall have been drawn, the box must be closed and well shaken so as to thoroughly mix the capsules therein. The district judge must draw a capsule containing a ballot with the juror's name thereon through an aperture made in the lid large enough only to admit his hand conveniently and without said judge gazing into said box before or while drawing said capsule.

History: En. Sec. 1051, C. Civ. Proc. 1895; re-en. Sec. 6732, Rev. C. 1907; amd. Sec. 11, Ch. 35, L. 1919; re-en. Sec. 9335, R.C.M. 1921; re-en. Sec. 9335, R.C.M. 1935; amd. Sec. 4, Ch. 151, L. 1937; amd. Sec. 4, Ch. 3, L. 1939; R.C.M. 1947, 93-5002.

25-7-205. Persons drawn and approved to form jury. The first 12 persons who appear, as their names are drawn and called, and are approved as indifferent between the parties and not discharged or excused must be sworn and constitute the jury to try the issue.

History: En. Sec. 1052, C. Civ. Proc. 1895; re-en. Sec. 6733, Rev. C. 1907; re-en. Sec. 9336, R.C.M. 1921; re-en. Sec. 9336, R.C.M. 1935; R.C.M. 1947, 93-5003.

25-7-206. Procedure when insufficient number attend. (1) If a sufficient number of jurors duly drawn and notified do not attend to form a jury, the district judge shall, pursuant to an order to be entered in the minutes, in the presence of the clerk of the court draw a sufficient number of ballots from the box to complete the jury. The sheriff shall notify the persons thus drawn to attend immediately or at a time fixed by court. If for any reason a sufficient number of jurors to try the issue is not obtained from the persons notified under an order made as prescribed in this section, the court may make another order or successive orders until a sufficient number is obtained.

(2) Each person so notified must attend at the time required by the notice and, unless excused by the court or set aside, must serve as a juror upon the trial. For a neglect or refusal to do so, he may be fined in the same manner as any other trial juror regularly drawn and notified. He is subject to the same exceptions and challenges as any other trial juror.

History: En. Sec. 1057, C. Civ. Proc. 1895; re-en. Sec. 6738, Rev. C. 1907; re-en. Sec. 9341, R.C.M. 1921; re-en. Sec. 9341, R.C.M. 1935; amd. Sec. 5, Ch. 151, L. 1937; amd. Sec. 5, Ch. 3, L. 1939; amd. Sec. 46, Ch. 344, L. 1977; R.C.M. 1947, 93-5008.

25-7-207. Oath of jury. As soon as the jury is completed, an oath must be administered to the jurors, in substance, that they and each of them will well and truly try the matter in issue between ...., the plaintiff, and ...., the defendant, and render a true verdict according to the evidence.

History: En. Sec. 132, p. 69, Bannack Stat.; re-en. Sec. 160, p. 164, L. 1867; re-en. Sec. 196, p. 66, Cod. Stat. 1871; re-en. Sec. 247, p. 100, L. 1877; re-en. Sec. 247, 1st Div. Rev. Stat. 1879; re-en. Sec. 256, 1st Div. Comp. Stat. 1887; amd. Sec. 1064, C. Civ. Proc. 1895; re-en. Sec. 6745, Rev. C. 1907; re-en. Sec. 9348, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 604; R.C.M. 1947, 93-5015.

25-7-208. Capsules containing ballots of jurors who have been sworn. The capsules containing the ballots with the names of the jurors so sworn must be then deposited in another box and there kept apart from the other capsules containing ballots with the names of jurors until that jury is discharged. After the jury is discharged, the capsules containing the ballots with the names of the jurors thereon must be returned to the box from which they were first taken.

History: Ap. p. Sec. 1053, C. Civ. Proc. 1895; re-en. Sec. 6734, Rev. C. 1907; amd. Sec. 12, Ch. 35, L. 1919; re-en. Sec. 9337, R.C.M. 1921; re-en. Sec. 9337, R.C.M. 1935; Sec. 93-5004, R.C.M. 1947; Ap. p. Sec. 1054, C. Civ. Proc. 1895; re-en. Sec. 6735, Rev. C. 1907; amd. Sec. 13, Ch. 35, L. 1919; re-en. Sec. 9338, R.C.M. 1921; re-en. Sec. 9338, R.C.M. 1935; Sec. 93-5005, R.C.M. 1947; R.C.M. 1947, 93-5004, 93-5005(part).

25-7-209. Capsules containing ballots of jurors not sworn. The capsule containing the ballot with the name of a juror who is absent when his name is drawn or called or is set aside or excused from serving on that trial must be again returned to the box containing the undrawn capsules as soon as the jury is sworn.

History: En. Sec. 1055, C. Civ. Proc. 1895; re-en. Sec. 6736, Rev. C. 1907; amd. Sec. 14, Ch. 35, L. 1919; re-en. Sec. 9339, R.C.M. 1921; re-en. Sec. 9339, R.C.M. 1935; R.C.M. 1947, 93-5006.

25-7-210. Alternate jurors. (1) Whenever, in the opinion of a judge of a district court about to try a defendant against whom has been filed any indictment or information for a felony or a civil court case, the trial of which is likely to be a protracted one, the court may cause an entry to that effect to be made in the minutes of the court and thereupon, immediately after the jury is impaneled and sworn, the court may direct the calling of one or two additional jurors, in its discretion, to be known as "alternate jurors".

(2) Such jurors must be drawn from the same source and in the same manner and have the same qualifications as the jurors already sworn and be subject to the same examination and challenges, provided that the prosecution, or plaintiff, and the defendant shall each be entitled to one peremptory challenge to such alternate jurors.

(3) Such alternate jurors shall be seated near, with equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the jurors already selected. They must attend at all times upon the trial of the cause in company with the other jurors and for a failure to do so are liable to be punished for contempt.

(4) They shall obey the orders of and be bound by the admonition of the court upon each adjournment of the court; but if the regular jurors are ordered to be kept in custody during the trial of the cause, such alternate jurors shall also be kept in confinement with the other jurors and, except as hereinafter provided, shall be discharged upon the final submission of the case to the jury.

(5) If before the final submission of the case a juror becomes ill so as to be unable to perform his duty, the court may order him to be discharged in that event, or in case a juror should die, the name of an alternate may be drawn and he shall then take his place in the jury box and be subject to the same rules and regulations as though he had been selected as one of the original jurors.

History: En. Sec. 1, Ch. 5, L. 1935; re-en. Sec. 8927.1, R.C.M. 1935; R.C.M. 1947, 93-1811.

Compiler's Comments

Obsolescence. The Code Commissioner's staff feels that this section should be repealed because it conflicts with Rule 47(c), M.R.Civ.P., and section 46-16-307, MCA.

25-7-211 through 25-7-220 reserved.

25-7-221. Challenges to jurors and the jury. (1) Each party may challenge the jury or jurors as follows:

(a) the panel or array;

(b) for cause;

(c) peremptory.

(2) Challenges to individual jurors are for cause or peremptory.

History: En. Sec. 133, p. 69, Bannack Stat.; re-en. Sec. 161, p. 164, L. 1867; amd. Sec. 197, p. 66, Cod. Stat. 1871; amd. Sec. 248, p. 100, L. 1877; amd. Sec. 248, 1st Div. Rev. Stat. 1879; re-en. Sec. 257, 1st Div. Comp. Stat. 1887; re-en. Sec. 1059, C. Civ. Proc. 1895; re-en. Sec. 6740, Rev. C. 1907; re-en. Sec. 9343, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 301; re-en. Sec. 9343, R.C.M. 1935; amd. Sec. 1, Ch. 300, L. 1971; R.C.M. 1947, 93-5010(part).

25-7-222. Challenges to the array or panel. (1) A challenge to the array or panel may be made and the whole array or panel set aside by the court when the jury was not selected, drawn, summoned, or notified as prescribed by law. It is not a valid objection to a jury that it contains none of the jurors originally returned to the court or is only partially composed of such jurors.

(2) There can be only one challenge on a side to the array or panel, which may be made by one or more of the parties.

History: Ap. p. Sec. 1058, C. Civ. Proc. 1895; re-en. Sec. 6739, Rev. C. 1907; re-en. Sec. 9342, R.C.M. 1921; re-en. Sec. 9342, R.C.M. 1935; Sec. 93-5009, R.C.M. 1947; Ap. p. Sec. 133, p. 69, Bannack Stat.; re-en. Sec. 161, p. 164, L. 1867; amd. Sec. 197, p. 66, Cod. Stat. 1871; amd. Sec. 248, p. 100, L. 1877; amd. Sec. 248, 1st Div. Rev. Stat. 1879; re-en. Sec. 257, 1st Div. Comp. Stat. 1887; re-en. Sec. 1059, C. Civ. Proc. 1895; re-en. Sec. 6740, Rev. C. 1907; re-en. Sec. 9343, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 301; re-en. Sec. 9343, R.C.M. 1935; amd. Sec. 1, Ch. 300, L. 1971; Sec. 93-5010, R.C.M. 1947; R.C.M. 1947, 93-5009, 93-5010(part).

25-7-223. Challenges to jurors for cause. Challenges for cause may be taken on one or more of the following grounds:

(1) a want of any of the qualifications prescribed by this code to render a person competent as a juror;

(2) consanguinity or affinity within the sixth degree to any party;

(3) standing in the relation of guardian and ward, master and servant, debtor and creditor, employer and clerk, or principal and agent to either party or being a member of the family of either party or a partner in business with either party or surety on any bond or obligation for either party. However, a challenge for cause may not be taken because of debtor and creditor relation when the same arises solely by reason of current bills of gas, water, electricty, or telephone.

(4) having served as a juror or been a witness on a previous trial between the same parties for the same cause of action;

(5) interest on the part of the juror in the event of the action or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation;

(6) having an unqualified opinion or belief as to the merits of the action;

(7) the existence of a state of mind in the juror evincing enmity against or bias in favor of either party.

History: En. Sec. 134, p. 70, Bannack Stat.; re-en. Sec. 162, p. 164, L. 1867; re-en. Sec. 198, p. 66, Cod. Stat. 1871; re-en. Sec. 249, p. 100, L. 1877; re-en. Sec. 249, 1st Div. Rev. Stat. 1879; re-en. Sec. 258, 1st Div. Comp. Stat. 1887; amd. Sec. 1060, C. Civ. Proc. 1895; re-en. Sec. 6741, Rev. C.

1907; re-en. Sec. 9344, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 602; re-en. Sec. 9344, R.C.M. 1935; amd Sec. 1, Ch. 10, L. 1953; R.C.M. 1947, 93-5011.

25-7-224. Peremptory challenges to jurors. (1) Each party is entitled to four peremptory challenges, except as provided for under subsection (2). If no peremptory challenges are taken until the panel is full, they mus be taken by the parties alternately, commencing with the plaintiff.

(2) Where a six-person jury is authorized by law, each side shall have two peremptory challenges. They shall be exercised by the plaintiff first striking one and the defendant then striking one, and so on until each side has exhausted or waived his rights.

History: (1)En. Sec. 133, p. 69, Bannack Stat.; re-en. Sec. 161, p. 164, L. 1867; amd. Sec. 197 p. 66, Cod. Stat. 1871; amd. Sec. 248, p. 100, L. 1877; amd. Sec. 248, 1st Div. Rev. Stat. 1879; re-en Sec. 257, 1st Div. Comp. Stat. 1887; re-en. Sec. 1059, C. Civ. Proc. 1895; re-en. Sec. 6740, Rev. C 1907; re-en. Sec. 9343, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 301; re-en. Sec. 9343, R.C.M. 1935; amd Sec. 1, Ch. 300, L. 1971; Sec. 93-5010, R.C.M. 1947; (2)En. Sec. 224, C. Civ. Proc. 1895; re-en. Sec 6334, Rev. C. 1907; re-en. Sec. 8887, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 194; re-en. Sec. 8887 R.C.M. 1935; amd. Sec. 4, Ch. 203, L. 1939; amd. Sec. 1, Ch. 293, L. 1971; Sec. 93-1205, R.C.M 1947; R.C.M. 1947, 93-1205(part), 93-5010(part).

Part 3

Order and Conduct of Trial by Jury

25-7-301. Order of trial. When the jury has been sworn, the trial shall proceed in the following order unless the court, for good cause and special reason, otherwise directs:

(1) The party on whom rests the burden of the issues may briefly state his case and the evidence by which he expects to sustain it.

(2) The adverse party may then, or at the opening of his case, briefly state his defense and the evidence he expects to offer in support of it.

(3) The party on whom rests the burden of the issues must first produce his evidence; the adverse party will then produce his evidence.

(4) The parties will then be confined to rebutting evidence unless the court, for good reasons in furtherance of justice, permits them to offer evidence in their original case.

(5) When the instructions have been passed upon and settled by the court and before the arguments of counsel to the jury have begun, the court shall charge the jury in writing, giving in such charge only such instructions as are passed upon and settled at such settlement. In charging the jury, the court shall give to it all matters of law which the court thinks necessary for the jury's information in rendering a verdict.

(6) When the jury has been charged, unless the case is submitted to the jury on either side or on both sides without argument, the party upon whom rests the burden of proof must commence and may conclude the argument. If several defendants having several defenses appear by different counsel, the court must determine their relative order in the evidence and argument. Counsel, in arguing the case to the jury, may argue and comment upon the law of the case as given in the instructions of the court, as well as upon the evidence in the case.

History: En. Sec. 1, Ch. 34, L. 1907; Sec. 6746, Rev. C. 1907; re-en. Sec. 9349, R.C.M. 1921; Cal. C. Civ. Proc. Secs. 607, 608; re-en. Sec. 9349, R.C.M. 1935; amd. Sec. 84, Ch. 13, L. 1961; R.C.M. 1947, 93-5101.

25-7-302. Directed verdict when no issues of fact. Where, upon the trial of an issue by a jury, the case presents only questions of law, the judge may direct the jury to render a verdict in favor of the party entitled thereto.

History: En. Sec. 1104, C. Civ. Proc. Sec. 1895; re-en. Sec. 6761, Rev. C. 1907; re-en. Sec. 9364, R.C.M. 1921; re-en. Sec. 9364, R.C.M. 1935; R.C.M. 1947, 93-5205.

25-7-303. Activity of court during jury's absence. While the jury is absent, the court may adjourn from time to time in respect to other business, but it is nevertheless open for every purpose connected with the case submitted to the jury until a verdict is rendered or the jury discharged. The court may direct the jury to bring in a sealed verdict at the opening of the court in case of an agreement during a recess or adjournment for the day.

History: En. Sec. 142, p. 71, Bannack Stat.; re-en. Sec. 170, p. 166, L. 1867; re-en. Sec. 210, p. 8, Cod. Stat. 1871; re-en. Sec. 260, p. 103, L. 1877; re-en. Sec. 260, 1st Div. Rev. Stat. 1879; re-en. Sec. 269, 1st Div. Comp. Stat. 1887; amd. Sec. 1088, C. Civ. Proc. 1895; re-en. Sec. 6754, Rev. C. 907; re-en. Sec. 9357, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 617; re-en. Sec. 9357, R.C.M. 1935; R.C.M. 1947, 93-5109.

25-7-304. Procedure when a juror becomes sick. If, after the impaneling of the jury and before verdict, a juror becomes sick so as to be unable to perform his duty, the court may order him to be discharged. In that case, the trial may proceed with the other jurors or another juror may be sworn and the trial may begin anew or the jury may be discharged and a new jury then or afterward impaneled.

History: En. Sec. 136, p. 70, Bannack Stat.; amd. Sec. 164, p. 165, L. 1867; re-en. Sec. 205, p. 8, Cod. Stat. 1871; re-en. Sec. 255, p. 103, L. 1877; re-en. Sec. 255, 1st Div. Rev. Stat. 1879; re-en. Sec. 264, 1st Div. Comp. Stat. 1887; re-en. Sec. 1086, C. Civ. Proc. 1895; re-en. Sec. 6752, Rev. C. 907; re-en. Sec. 9355, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 615; re-en. Sec. 9355, R.C.M. 1935; R.C.M. 1947, 93-5107.

25-7-305. Procedure when jury prevented from giving verdict. In all cases where the jury is discharged or prevented from giving a verdict by reason of accident or other cause during the progress of the trial or after the case is submitted to it, the action may be again tried immediately or at a future time, as the court may direct.

History: En. Sec. 141, p. 71, Bannack Stat.; amd. Sec. 169, p. 166, L. 1867; re-en. Sec. 209, p. 8, Cod. Stat. 1871; re-en. Sec. 259, p. 104, L. 1877; re-en. Sec. 259, 1st Div. Rev. Stat. 1879; re-en. Sec. 268, 1st Div. Comp. Stat. 1887; re-en. Sec. 1087, C. Civ. Proc. 1895; re-en. Sec. 6753, Rev. C. 907; re-en. Sec. 9356, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 616; re-en. Sec. 9356, R.C.M. 1935; R.C.M. 1947, 93-5108.

Part 4

Conduct of Jury

25-7-401. View by jury of the premises. When, in the opinion of the court, it is proper for the jury to have a view of the property which is the subject of litigation or of the place at which any material fact occurred, it may order the jurors to be conducted in a body, under the charge of an officer and one person representing each party, to the place, which shall be shown to them by the persons appointed by the court for that purpose. While the jury is thus absent, no person other than the persons so appointed shall speak to it on any subject connected with the trial, and such person shall not speak to the jury upon any matters connected with the subject o the action but may point out to the jury the property in litigation or the place at which any material fact occurred.

History: En. Sec. 204, p. 68, Cod. Stat. 1871; re-en. Sec. 254, p. 103, L. 1877; re-en. Sec. 254 1st Div. Rev. Stat. 1879; re-en. Sec. 263, 1st Div. Comp. Stat. 1887; amd. Sec. 1081, C. Civ. Proc 1895; re-en. Sec. 6747, Rev. C. 1907; re-en. Sec. 9350, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 610; re-en Sec. 9350, R.C.M. 1935; R.C.M. 1947, 93-5102.

25-7-402. Admonition when jury permitted to separate. If the jurors are permitted to separate, either during the trial or after the case i submitted to them, they shall be admonished by the court that it is thei duty not to converse with or suffer themselves to be addressed by any othe person on any subject of the trial and that it is their duty not to form o express an opinion thereon until the case is finally submitted to them.

History: En. Sec. 263, p. 104, L. 1877; re-en. Sec. 263, 1st Div. Rev. Stat. 1879; re-en. Sec. 27 1st Div. Comp. Stat. 1887; re-en. Sec. 1082, C. Civ. Proc. 1895; re-en. Sec. 6748, Rev. C. 1907; re-en Sec. 9351, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 611; re-en. Sec. 9351, R.C.M. 1935; R.C.M. 1947 93-5103.

25-7-403. Conduct of jury after case submitted to it. When the case is finally submitted to the jury, it may decide in court or retire fo deliberation. If the jurors retire, they must be kept together in some convenient place, under charge of an officer, until at least two-thirds of them agree upon a verdict or are discharged by the court. Unless by order of the court the officer having them under his charge must not suffer any communication to be made to them or make any himself, except to ask them if they or two-thirds of them are agreed upon a verdict; and he must not, before their verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed upon.

History: En. Sec. 138, p. 71, Bannack Stat.; re-en. Sec. 166, p. 165, L. 1867; re-en. Sec. 206, p 68, Cod. Stat. 1871; re-en. Sec. 256, p. 103, L. 1877; re-en. Sec. 256, 1st Div. Rev. Stat. 1879; re-en Sec. 265, 1st Div. Comp. Stat. 1887; amd. Sec. 1084, C. Civ. Proc. 1895; re-en. Sec. 6750, Rev. C 1907; re-en. Sec. 9353, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 613; re-en. Sec. 9353, R.C.M. 1935 R.C.M. 1947, 93-5105.

25-7-404. Papers which may be taken into jury room. Upon retiring for deliberation, the jurors may take with them all papers which have been received as evidence in the cause except depositions or copies of such papers as ought not, in the opinion of the court, to be taken from the person having them in possession. They may also take with them notes of the testimony or other proceedings on the trial taken by themselves or any of them but none taken by any other person.

History: En. Sec. 139, p. 71, Bannack Stat.; re-en. Sec. 167, p. 166, L. 1867; amd. Sec. 207, p 68, Cod. Stat. 1871; re-en. Sec. 257, p. 103, L. 1877; re-en. Sec. 257, 1st Div. Rev. Stat. 1879; re-en Sec. 266, 1st Div. Comp. Stat. 1887; amd. Sec. 1083, C. Civ. Proc. 1895; re-en. Sec. 6749, Rev. C 1907; re-en. Sec. 9352, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 612; re-en. Sec. 9352, R.C.M. 1935 R.C.M. 1947, 93-5104.

25-7-405. Jury's request for further information. After the jury has retired for deliberation, if there be a disagreement among the jurors as to any part of the testimony or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be iven in the presence of or after notice to the parties or counsel. Such information must be given in writing or taken down by the stenographer.

History: En. Sec. 140, p. 71, Bannack Stat.; amd. Sec. 168, p. 166, L. 1867; re-en. Sec. 208, p. 8, Cod. Stat. 1871; re-en. Sec. 258, p. 103, L. 1877; re-en. Sec. 258, 1st Div. Rev. Stat. 1879; re-en. ec. 267, 1st Div. Comp. Stat. 1887; amd. Sec. 1085, C. Civ. Proc. 1895; re-en. Sec. 6751, Rev. C. 907; re-en. Sec. 9354, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 614; re-en. Sec. 9354, R.C.M. 1935; .C.M. 1947, 93-5106.

Part 5

Jury's Verdict

25-7-501. Return of verdict — polling the jury. (1) When the urors or two-thirds of them have agreed upon a verdict, they must be conlucted into court, their names called by the clerk, and the verdict rendered y their foreman. The verdict must be in writing and signed by the foreman nd must be read by the clerk to the jury, and the inquiry made whether it s their verdict.

(2) Either party may require the jury to be polled, which is done by the ourt or clerk asking each juror if it is his verdict. If upon such inquiry or olling more than one-third of the jurors disagree thereto, the jury must be ent out again, but if no such disagreement be expressed, the verdict is comlete and the jury discharged from the case.

History: En. Sec. 143, p. 72, Bannack Stat.; re-en. Sec. 171, p. 166, L. 1867; re-en. Sec. 211, p. 9, Cod. Stat. 1871; amd. Sec. 261, p. 104, L. 1877; re-en. Sec. 261, 1st Div. Rev. Stat. 1879; re-en. ec. 270, 1st Div. Comp. Stat. 1887; amd. Sec. 1089, C. Civ. Proc. 1895; re-en. Sec. 6755, Rev. C. 907; re-en. Sec. 9358, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 618; re-en. Sec. 9358, R.C.M. 1935; .C.M. 1947, 93-5110.

25-7-502. Content of verdict — action or counterclaim for ecovery of money. When a verdict is found for the plaintiff in an action or the recovery of money or for the defendant when a counterclaim for the ecovery of money is established exceeding the amount of the plaintiff's claim s established, the jury must also find the amount of the recovery.

History: En. Sec. 149, p. 73, Bannack Stat.; re-en. Sec. 176, p. 167, L. 1867; re-en. Sec. 216, p. 0, Cod. Stat. 1871; re-en. Sec. 266, p. 105, L. 1877; re-en. Sec. 266, 1st Div. Rev. Stat. 1879; re-en. ec. 276, 1st Div. Comp. Stat. 1887; amd. Sec. 1102, C. Civ. Proc. 1895; re-en. Sec. 6759, Rev. C. 907; re-en. Sec. 9362, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 626; re-en. Sec. 9362, R.C.M. 1935; .C.M. 1947, 93-5203.

25-7-503. Content of verdict — action for recovery of personal roperty. In an action for the recovery of specific personal property, if the roperty has not been delivered to the plaintiff or the defendant, by his nswer, claim a return thereof, the jury, if its verdict be in favor of the plainiff or if, being in favor of the defendant, it also finds that he is entitled to return thereof, shall find the value of the property (but failure to find all he facts mentioned in this section shall not invalidate the verdict) and may t the same time assess the damages, if they are claimed in the complaint r answer, which the prevailing party has sustained by reason of the taking r detention of such property.

History: En. Sec. 150, p. 73, Bannack Stat.; re-en. Sec. 177, p. 167, L. 1867; re-en. Sec. 217, p. 0, Cod. Stat. 1871; re-en. Sec. 267, p. 105, L. 1877; re-en. Sec. 267, 1st Div. Rev. Stat. 1879; re-en. ec. 277, 1st Div. Comp. Stat. 1887; re-en. Sec. 1103, C. Civ. Proc. 1895; re-en. Sec. 6760, Rev. C.

1907; re-en. Sec. 9363, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 627; re-en. Sec. 9363, R.C.M. 1935; R.C.M. 1947, 93-5204.

Part 6

Trial by the Court

25-7-601. Waiver of findings of fact. The findings of fact may be waived by the several parties to an issue of fact by:

(1) failing to appear at the trial;
(2) consent in writing filed with the clerk;
(3) oral consent in open court entered in the minutes.

History: En. Sec. 1113, C. Civ. Proc. 1895; re-en. Sec. 6765, Rev. C. 1907; re-en. Sec. 9368, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 634; re-en. Sec. 9368, R.C.M. 1935; R.C.M. 1947, 93-5304.

25-7-602. Trial upon agreed statement of facts. When any cause is tried and submitted upon a written statement of facts agreed to by the parties or their attorneys, such statement shall have the effect of a special verdict or finding of facts and judgment shall be pronounced thereon as upon a special verdict or finding of facts. In such case, no finding of facts shall be made unless such statement shall fail to embrace all the facts proved and in issue, in which case any additional fact may be found upon evidence which is not repugnant to the agreed statement.

History: En. Sec. 1117, C. Civ. Proc. 1895; re-en. Sec. 6769, Rev. C. 1907; re-en. Sec. 9372, R.C.M. 1921; re-en. Sec. 9372, R.C.M. 1935; R.C.M. 1947, 93-5308.

Part 7

Referees

25-7-701. Oath of referee. Every referee, before acting as such, shall take and subscribe an oath or affirmation before some authorized officer, which shall be filed with the clerk of the court by which he is appointed, that he will honestly, impartially, and faithfully perform the duties of referee in the action or matter referred to him, as required by law, to the best of his knowledge and ability.

History: En. Sec. 224, p. 72, Cod. Stat. 1871; re-en. Sec. 275, p. 108, L. 1877; re-en. Sec. 275, 1st Div. Rev. Stat. 1879; re-en. Sec. 285, 1st Div. Comp. Stat. 1887; re-en. Sec. 1133, C. Civ. Proc. 1895; re-en. Sec. 6774, Rev. C. 1907; re-en. Sec. 9377, R.C.M. 1921; re-en. Sec. 9377, R.C.M. 1935; R.C.M. 1947, 93-5404.

25-7-702. Grounds for objection to appointment of referee. Either party may object to the appointment of any person as referee on the same grounds that he might object to him as a trial juror, as provided in 25-7-223.

History: En. Sec. 185, p. 169, L. 1867; re-en. Sec. 225, p. 72, Cod. Stat. 1871; re-en. Sec. 276, p. 109, L. 1877; re-en. Sec. 276, 1st Div. Rev. Stat. 1879; re-en. Sec. 286, 1st Div. Comp. Stat. 1887; en. Sec. 1137, C. Civ. Proc. 1895; re-en. Sec. 6778, Rev. C. 1907; re-en. Sec. 9381, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 641; re-en. Sec. 9381, R.C.M. 1935; R.C.M. 1947, 93-5408.

25-7-703. Procedure upon objection. The objections taken to the appointment of any person as referee must be heard and disposed of by the court. Affidavits may be read and witnesses examined as to such objections.

History: En. Sec. 186, p. 170, L. 1867; re-en. Sec. 226, p. 73, Cod. Stat. 1871; re-en. Sec. 277, p. 109, L. 1877; re-en. Sec. 277, 1st Div. Rev. Stat. 1879; re-en. Sec. 287, 1st Div. Comp. Stat. 1887;

-en. Sec. 1138, C. Civ. Proc. 1895; re-en. Sec. 6779, Rev. C. 1907; re-en. Sec. 9382, R.C.M. 1921; al. C. Civ. Proc. Sec. 642; re-en. Sec. 9382, R.C.M. 1935; R.C.M. 1947, 93-5409.

CHAPTER 8

DEPOSIT IN COURT — DELIVERY TO PARTY

Part 1 — General Provisions

ection

5-8-101. When court may order deposit or delivery.
5-8-102. Enforcement of court's order.
5-8-103. With whom money deposited.
5-8-104. Safekeeping of deposit by county treasurer.

Part 1

General Provisions

25-8-101. When court may order deposit or delivery. When it is dmitted by the pleading or shown upon the examination of a party that he as in his possession or under his control any money or other thing capable f delivery which, being the subject of the litigation, is held by him as trustee or another party or which belongs or is due to another party, the court may rder the same, upon motion, to be deposited in court or delivered to such arty upon such conditions as may be just, subject to the further direction f the court.

History: En. Sec. 115, p. 66, Bannack Stat.; re-en. Sec. 142, p. 160, L. 1867; re-en. Sec. 178, p. 1, Cod. Stat. 1871; re-en. Sec. 227, p. 95, L. 1877; re-en. Sec. 227, 1st Div. Rev. Stat. 1879; re-en. ec. 235, 1st Div. Comp. Stat. 1887; amd. Sec. 970, C. Civ. Proc. 1895; re-en. Sec. 6705, Rev. C. 1907; e-en. Sec. 9308, R.C.M. 1921; Cal. C. Civ. Proc. 572; re-en. Sec. 9308, R.C.M. 1935; R.C.M. 1947, 3-4501.

25-8-102. Enforcement of court's order. Where the court directs a leposit or delivery of money or where a judgment directs a party to make deposit or delivery or to convey real property, if the direction is disobeyed, he court, besides punishing the disobedience as a contempt, may by order equire the sheriff to take and deposit or deliver the money or other personal roperty or to convey the real property in conformity with the direction of he court.

History: En. Sec. 229, p. 95, L. 1877; re-en. Sec. 229, 1st Div. Rev. Stat. 1879; re-en. Sec. 237, st Div. Comp. Stat. 1887; amd. Sec. 972, C. Civ. Proc. 1895; re-en. Sec. 6707, Rev. C. 1907; re-en. ec. 9310, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 574; re-en. Sec. 9310, R.C.M. 1935; R.C.M. 1947, 3-4504.

25-8-103. With whom money deposited. (1) Whenever moneys are aid into or deposited in court, the same shall be delivered to the clerk in erson or to such of his deputies as shall be specially authorized by his ppointment in writing to receive the same. He must, unless otherwise lirected by law, deposit it with the county treasurer to be held by him subect to the order of the court.

(2) Such appointment shall be filed with the county treasurer, who shall exhibit it and give to each person applying for the same a certified copy of the same. It shall be in force until a revocation in writing is filed with the county treasurer, who shall thereupon write "revoked" in ink across the face of the appointment.

History: En. Sec. 3443, C. Civ. Proc. 1895; re-en. Sec. 8057, Rev. C. 1907; re-en. Sec. 10701, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2104; re-en. Sec. 10701, R.C.M. 1935; R.C.M. 1947, 93-4503(part).

25-8-104. Safekeeping of deposit by county treasurer. The treasurer shall keep each fund distinct and open an account with each. For the safekeeping of the money deposited with the treasurer, his official bond shall be security.

History: Ap. p. Sec. 3443, C. Civ. Proc. 1895; re-en. Sec. 8057, Rev. C. 1907; re-en. Sec. 10701, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2104; re-en. Sec. 10701, R.C.M. 1935; Sec. 93-4503, R.C.M. 1947; Ap. p. Sec. 228, p. 95, L. 1877; re-en. Sec. 228, 1st. Div. Rev. Stat. 1879; re-en. Sec. 236, 1st Div. Comp. Stat. 1887; amd. Sec. 971, C. Civ. Proc. 1895; re-en. Sec. 6706, Rev. C. 1907; re-en. Sec. 9309, R.C.M.1921; Cal. C. Civ. Proc. Sec. 573; re-en. Sec. 9309, R.C.M. 1935; Sec. 93-4502, R.C.M. 1947; R.C.M. 1947, 93-4502(part), 93-4503(part).

CHAPTER 9

JUDGMENT

Part 1 — General Provisions

Section

25-9-101. Judgment to be on the merits.
25-9-102. Judgment for or against married person.
25-9-103. Death of party after verdict, no lien.
25-9-104. Procedure after judgment on an issue of law.
25-9-105. Validation of defective judgments affecting realty.

Part 2 — Contents of Judgment

25-9-201. Whose rights determined in judgment.
25-9-202. Designation in judgment of principal debtors and sureties.
25-9-203. How amount expressed.
25-9-204. Clerk to include interest in judgment.

Part 3 — Entry of Judgment and Satisfaction — Lien

25-9-301. Docketing of judgment — lien.
25-9-302. Filing of transcript of docket in another county.
25-9-303. Filing of transcript of docket of federal court.
Sections 25-9-304 through 25-9-310 reserved.
25-9-311. Entry of satisfaction of judgment in docket.

Part 1

General Provisions

25-9-101. Judgment to be on the merits. In every case, judgment must be rendered on the merits, except as provided in Rule 41, M.R.Civ.P.

History: En. Sec. 122, p. 68, Bannack Stat.; re-en. Sec. 149, p. 162, L. 1867; re-en. Sec. 185, p. 63, Cod. Stat. 1871; re-en. Sec. 235, p. 96, L. 1877; re-en. Sec. 235, 1st Div. Rev. Stat. 1879; re-en.

Sec. 243, 1st Div. Comp. Stat. 1887; re-en. Sec. 1005, C. Civ. Proc. 1895; re-en. Sec. 6715, Rev. C. 1907; re-en. Sec. 9318, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 582; re-en. Sec. 9318, R.C.M. 1935; R.C.M. 1947, 93-4706.

25-9-102. Judgment for or against married person. Judgment for or against a married person may be rendered and enforced as if such person were single.

History: En. Sec. 1006, C. Civ. Proc. 1895; re-en. Sec. 6716, Rev. C. 1907; re-en. Sec. 9319, R.C.M. 1921; re-en. Sec. 9319, R.C.M. 1935; amd. Sec. 54, Ch. 535, L. 1975; R.C.M. 1947, 93-4707.

25-9-103. Death of party after verdict, no lien. If a party die after a verdict or decision upon any issue of fact and before judgment, the court may nevertheless render judgment thereon. Such a judgment is not a lien on the real property of the deceased party but is payable in the course of administration on his estate.

History: En. Sec. 178, p. 78, Bannack Stat.; amd. Sec. 202, p. 174, L. 1867; re-en. Sec. 242, p. 77, Cod. Stat. 1871; re-en. Sec. 293, p. 116, L. 1877; re-en. Sec. 293, 1st Div. Rev. Stat. 1879; re-en. Sec. 305, 1st Div. Comp. Stat. 1887; re-en. Sec. 1195, C. Civ. Proc. 1895; re-en. Sec. 6805, Rev. C. 1907; re-en. Sec. 9408, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 669; re-en. Sec. 9408, R.C.M. 1935; R.C.M. 1947, 93-5706.

25-9-104. Procedure after judgment on an issue of law. On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by Rule 55(a) and (b), M.R.Civ.P., upon the failure of the defendant to answer. If judgment be for the defendant upon an issue of law and the taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference may be ordered, as provided in Rule 55(b).

History: En. Sec. 272, p. 107, L. 1877; re-en. Sec. 272, 1st Div. Rev. Stat. 1879; re-en. Sec. 282, 1st Div. Comp. Stat. 1887; re-en. Sec. 1118, C. Civ. Proc. 1895; re-en. Sec. 6770, Rev. C. 1907; re-en. Sec. 9373, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 636; re-en. Sec. 9373, R.C.M. 1935; R.C.M. 1947, 93-5309.

25-9-105. Validation of defective judgments affecting realty. Any judgment or decree of any court of this state affecting real property, provided that no action is now pending to set aside any such judgment or decree, which was, prior to January 1, 1973, copied into the proper book kept in the office of the clerk of the district court, and certified copy of which judgment or decree was, previous to July 1, 1973, recorded in the proper book kept in the office of the county clerk and recorder shall be deemed to impart, after that date, notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, informality, or irregularity in any of the court proceedings in the action in which such judgment or decree was entered and obtained, if time for appeal in the case has expired; and such judgment or decree shall not be deemed invalidated by reason of any such defect, omission, informality, or irregularity; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date. Duly certified copies of such judgment or decree or of the record thereof may be read in evidence with like effect as copies of a judgment or decree duly and regularly obtained and recorded and entered.

History: En. Sec. 1, Ch. 146, L. 1973; R.C.M. 1947, 93-5710.5.

Part 2

Contents of Judgment

25-9-201. Whose rights determined in judgment. Judgment may be given for or against one or more of several plaintiffs and for or against one or more of several defendants, and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.

History: En. Sec. 118, p. 67, Bannack Stat.; re-en. Sec. 145, p. 161, L. 1867; re-en. Sec. 181, p. 62, Cod. Stat. 1871; re-en. Sec. 231, p. 95, L. 1877; re-en. Sec. 231, 1st. Div. Rev. Stat. 1879; re-en. Sec. 239, 1st Div. Comp. Stat. 1887; re-en. Sec. 1001, C. Civ. Proc. 1895; re-en. Sec. 6711, Rev. C. 1907; re-en. Sec. 9314, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 578; re-en. Sec. 9314, R.C.M. 1935; R.C.M. 1947, 93-4702(part).

25-9-202. Designation in judgment of principal debtors and sureties. Upon the rendition of any judgment, if it shall be shown that one or more of the defendants against whom the judgment is to be rendered are principal debtors and others of the said defendants are sureties of such principal debtor, the court may order the judgment so to state.

History: En. Sec. 118, p. 67, Bannack Stat.; re-en. Sec. 145, p. 161, L. 1867; re-en. Sec. 181, p. 62, Cod. Stat. 1871; re-en. Sec. 231, p. 95, L. 1877; re-en. Sec. 231, 1st. Div. Rev. Stat. 1879; re-en. Sec. 239, 1st Div. Comp. Stat. 1887; re-en. Sec. 1001, C. Civ. Proc. 1895; re-en. Sec. 6711, Rev. C. 1907; re-en. Sec. 9314, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 578; re-en. Sec. 9314, R.C.M. 1935; R.C.M. 1947, 93-4702(part).

25-9-203. How amount expressed. In judgments, the amount thereof must be computed and stated as near as may be in dollars and cents, rejecting fractions of a cent.

History: En. Sec. 3152, Pol. C. 1895; re-en. Sec. 2035, Rev. C. 1907; re-en. Sec. 4285, R.C.M. 1921; Cal. Pol. C. Sec. 3274; re-en. Sec. 4285, R.C.M. 1935; R.C.M. 1947, 93-4710(part).

25-9-204. Clerk to include interest in judgment. The clerk must include in the judgment entered up by him any interest on the verdict or decision of the court, from the time it was rendered or made.

History: En. Sec. 482, p. 230, L. 1867; re-en. Sec. 558, p. 149, Cod. Stat. 1871; re-en. Sec. 500, p. 172, L. 1877; re-en. Sec. 500, 1st Div. Rev. Stat. 1879; re-en. Sec. 513, 1st Div. Comp. Stat. 1887; re-en. Sec. 1870, C. Civ. Proc. 1895; re-en. Sec. 7173, Rev. C. 1907; re-en. Sec. 9806, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1035; re-en. Sec. 9806, R.C.M. 1935; R.C.M. 1947, 93-8622(part).

25-9-205. Amount of interest. (1) Except as provided in subsection (2), interest is payable on judgments recovered in the courts of this state at the rate of 10% per annum and no greater rate. Such interest must not be compounded in any manner or form.

(2) Interest on a judgment recovered in the courts of this state involving a contractual obligation that specifies an interest rate must be paid at the rate specified in the contractual obligation.

History: En. Sec. 2588, Civ. C. 1895; amd. Sec. 1, p. 125, L. 1899; re-en. Sec. 5214, Rev. C. 1907; re-en. Sec. 7729, R.C.M. 1921; Cal. Civ. C. Sec. 1920; amd. Sec. 1, Ch. 143, L. 1933; re-en. Sec. 7729, R.C.M. 1935; R.C.M. 1947, 47-128; amd. Sec. 1, Ch. 373, L. 1979; amd. Sec. 1, Ch. 649, L. 1979; Sec. 31-1-110, MCA 1979; redes. 25-9-205 by Code Commissioner, 1979.

Compiler's Comments

Application. Sec. 3, Ch. 373, L. 1979, provided: "This act applies only to judgments entered after June 30, 1979."

Application. Sec. 2, Ch. 649, L. 1979, provided: "This act applies to all judgments entered before and remaining unsatisfied on July 1, 1979, except that the 10% interest rate becomes effective on July 1, 1979."

Part 3

Entry of Judgment and Satisfaction — Lien

25-9-301. Docketing of judgment — lien. (1) Immediately after the entry of the judgment in the judgment book, the clerk must make the proper entries of the judgment under appropriate heads in the docket kept by him.

(2) From the time the judgment is docketed, it becomes a lien upon all real property of the judgment debtor not exempt from execution in the county, owned by him at the time or which he may afterward acquire until the lien ceases. The lien continues for 6 years unless the judgment be previously satisfied.

History: En. Sec. 180, p. 78, Bannack Stat.; en. Sec. 204, p. 174, L. 1867; re-en. Sec. 244, p. 77, Cod. Stat. 1871; amd. Sec. 1, p. 40, L. 1876; re-en. Sec. 295, p. 116, L. 1877; re-en. Sec. 295, 1st Div. Rev. Stat. 1879; re-en. Sec. 307, 1st Div. Comp. Stat. 1887; re-en. Sec. 1197, C. Civ. Proc. 1895; re-en. Sec. 6807, Rev. C. 1907; re-en. Sec. 9410, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 671; re-en. Sec. 9410, R.C.M. 1935; amd. Sup. Ct. Ord. 11020, December 10, 1965, eff. January 1, 1966; R.C.M. 1947, 93-5708.

25-9-302. Filing of transcript of docket in another county. A transcript of the original docket, certified by the clerk, may be filed with the district court clerk of any other county; and from the time of the filing, the judgment becomes a lien upon all real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time or which he may afterward and before the lien expires acquire. The lien continues for 6 years unless the judgment be previously satisfied.

History: En. Sec. 181, p. 78, Bannack Stat.; re-en. Sec. 207, p. 175, L. 1867; re-en. Sec. 247, p. 78, L. 1871; en. Sec. 1, p. 40, L. 1876; re-en. Sec. 298, p. 117, L. 1877; re-en. Sec. 298, 1st Div. Rev. Stat. 1879; re-en. Sec. 310, 1st Div. Comp. Stat. 1887; amd. Sec. 1200, C. Civ. Proc. 1895; re-en. Sec. 6810, Rev. C. 1907; re-en. Sec. 9413, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 674; re-en. Sec. 9413, R.C.M. 1935; R.C.M. 1947, 93-5712.

25-9-303. Filing of transcript of docket of federal court. A transcript of the original docket of any judgment rendered in the circuit or district court of the United States, ninth circuit, district of Montana, certified by the clerk of said court, may be filed with the district court clerk of any county; and from the time of the filing, the judgment becomes a lien upon all real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time or which he may afterward and before the lien expires acquire. The lien shall continue for 6 years unless the judgment be previously satisfied.

History: En. Sec. 1, Ch. 14, L. 1907; re-en. Sec. 6812, Rev. C. 1907; re-en. Sec. 9415, R.C.M. 1921; re-en. Sec. 9415, R.C.M. 1935; R.C.M. 1947, 93-5714.

25-9-304 through 25-9-310 reserved.

25-9-311. Entry of satisfaction of judgment in docket. Satisfaction of a judgment may be entered in the clerk's docket upon an execution returned satisfied or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property by the judgment creditor or by his endorsement on the face or on the margin of the record of the judgment or by his attorney unless a revocation of his authority is filed. Whenever a judgment is satisfied in fact otherwise than upon an execution, the party or attorney must give such acknowledgment or make such endorsement, and upon motion, the court may compel it or may order the entry of satisfaction to be made without it.

History: En. Sec. 182, p. 79, Bannack Stat.; amd. Sec. 208, p. 175, L. 1867; re-en. Sec. 248, p. 78, L. 1871; en. Sec. 299, p. 117, L. 1877; re-en. Sec. 299, 1st Div. Rev. Stat. 1879; re-en. Sec. 311, 1st Div. Comp. Stat. 1887; re-en. Sec. 1201, C. Civ. Proc. 1895; re-en. Sec. 6811, Rev. C. 1907; re-en. Sec. 9414, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 675; re-en. Sec. 9414, R.C.M. 1935; R.C.M. 1947, 93-5713.

CHAPTER 10

COSTS

Part 1 — Imposition of Costs

Section
25-10-101. When costs allowed, of course, to plaintiff.
25-10-102. When costs allowed, of course, to defendant.
25-10-103. When costs discretionary.
25-10-104. When costs of appeal discretionary.
25-10-105. Costs of review other than by appeal.
25-10-106. Several defendants not united in interest.
25-10-107. Costs when tender was made before commencement of action.
25-10-108. Imposing costs on party acting as representative.

Part 2 — Allowable Costs

25-10-201. Costs generally allowable.
25-10-202. Costs of demurrer or motion.
25-10-203. Costs of postponement.
25-10-204. Costs of transferring papers — change of venue.
25-10-205. Costs of securing witnesses — disqualification of judge.
25-10-206. Secretary of state's fee for accepting service of process.

Part 3 — Attorneys' Fees

25-10-301. Determining compensation of attorneys.
25-10-302. Inclusion of attorney's fees in bill of costs.

Part 4 — Officers' Fees, Prepayment

25-10-401. Itemization of officer's fees.
25-10-402. No charge for copies furnished by party.
25-10-403. Prepayment of fees.
25-10-404. Poor persons not required to prepay fees.
25-10-405. Governmental entities not required to prepay fees.
25-10-406. Collection of clerk's and sheriff's costs after judgment.

Part 5 — Claiming Costs

25-10-501. Bill of costs.
25-10-502. Procedure upon objection to bill of costs.
25-10-503. How costs on appeal claimed.
25-10-504. Clerk to include costs in judgment.

Part 6 — Security for Costs

25-10-601. Security for costs from nonresident plaintiff.
25-10-602. Dismissal when security not given.

Part 7 — Payment of Costs by Governmental Entities

25-10-701. Public officers not to be personally taxed.

25-10-702. Payment of costs by state.
25-10-703. Payment of costs by county.
Sections 25-10-704 through 25-10-710 reserved.
25-10-711. Award of costs against governmental entity when suit or defense is frivolous or pursued in bad faith.

Part 1

Imposition of Costs

25-10-101. When costs allowed, of course, to plaintiff. Costs are allowed, of course, to the plaintiff upon a judgment in his favor in the following cases:

(1) in an action for the recovery of real property or damages thereto;

(2) in an action to recover the possession of personal property where the value of the property exceeds $50; such value shall be determined by the jury, court, or referee by whom the action is tried;

(3) in an action for the recovery of money or damages, exclusive of interest, when plaintiff recovers over $50;

(4) in a special proceeding;

(5) in an action which involves the title or possession or right of possession of real estate; or the legality of any tax, impost, assessment, toll, or municipal fine; or quo warranto proceedings;

(6) in an action to foreclose a lien or pledge, to prevent or abate a nuisance, or for an injunction.

History: En. Sec. 401, p. 126, Bannack Stat.; re-en. Sec. 470, p. 229, L. 1867; re-en. Sec. 546, p. 147, Cod. Stat. 1871; re-en. Sec. 482, p. 168, L. 1877; re-en. Sec. 482, 1st Div. Rev. Stat. 1879; amd. Sec. 10, p. 11, L. 1881; re-en. Sec. 495, 1st Div. Comp. Stat. 1887; en. Sec. 1851, C. Civ. Proc. 1895; re-en. Sec. 7154, Rev. C. 1907; re-en. Sec. 9787, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1022; re-en. Sec. 9787, R.C.M. 1935; R.C.M. 1947, 93-8602.

25-10-102. When costs allowed, of course, to defendant. Costs must be allowed, of course, to the defendant upon a judgment in his favor in the actions mentioned in 25-10-101.

History: En. Sec. 472, p. 229, L. 1867; re-en. Sec. 548, p. 148, Cod. Stat. 1871; re-en. Sec. 484, p. 169, L. 1877; re-en. Sec. 484, 1st Div. Rev. Stat. 1879; re-en. Sec. 497, 1st Div. Comp. Stat. 1887; amd. Sec. 1853, C. Civ. Proc. 1895; re-en. Sec. 7155, Rev. C. 1907; re-en. Sec. 9788, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1024; re-en. Sec. 9788, R.C.M. 1935; R.C.M. 1947, 93-8603.

25-10-103. When costs discretionary. Unless otherwise provided, in actions other than those mentioned in 25-10-101, costs may be allowed or not and, if allowed, may be apportioned between the parties on the same or adverse sides, in the discretion of the court, but no costs can be allowed in an action for the recovery of money or damages when the plaintiff fails to recover more than $50 or in an action to recover the possession of personal property when the value of the property is not more than $50.

History: En. Sec. 404, p. 127, Bannack Stat.; en. Sec. 473, p. 229, L. 1867; re-en. Sec. 549, p. 148, Cod. Stat. 1871; re-en. Sec. 485, p. 169, L. 1877; re-en. Sec. 485, 1st Div. Rev. Stat. 1879; amd. Sec. 11, p. 11, L. 1881; re-en. Sec. 498, 1st Div. Comp. Stat. 1887; amd. Sec. 1853, C. Civ. Proc. 1895; re-en. Sec. 7156, Rev. C. 1907; re-en. Sec. 9789, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1025; re-en. Sec. 9789, R.C.M. 1935; R.C.M. 1947, 93-8604; amd. Sec. 4, Ch. 402, L. 1979.

25-10-104. When costs of appeal discretionary. (1) In the following cases, the costs of appeal are in the discretion of the court:

(a) when a new trial is ordered;

(b) when a judgment is modified.

(2) In all other cases the successful party shall recover from the other party his costs.

History: En. Sec. 406, p. 127, Bannack Stat.; amd. Sec. 475, p. 229, L. 1867; re-en. Sec. 551, p. 148, Cod. Stat. 1871; re-en. Sec. 487, p. 169, L. 1877; re-en. Sec. 487, 1st Div. Rev. Stat. 1879; re-en. Sec. 500, 1st Div. Comp. Stat. 1887; amd. Sec. 1855, C. Civ. Proc. 1895; re-en. Sec. 7158, Rev. C. 1907; re-en. Sec. 9791, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1027; re-en. Sec. 9791, R.C.M. 1935; R.C.M. 1947, 93-8606.

25-10-105. Costs of review other than by appeal. When the decision of a court of limited jurisdiction in a special proceeding is brought before a court of higher jurisdiction for a review in any other way than by appeal, the same costs must be allowed as in cases on appeal and may be collected by execution or in such manner as the court may direct, according to the nature of the case.

History: En. Sec. 411, p. 127, Bannack Stat.; re-en. Sec. 480, p. 230, L. 1867; re-en. Sec. 556, p. 149, Cod. Stat. 1871; re-en. Sec. 493, p. 170, L. 1877; re-en. Sec. 493, 1st Div. Rev. Stat. 1879; re-en. Sec. 506, 1st Div. Comp. Stat. 1887; re-en. Sec. 1860, C. Civ. Proc. 1895; re-en. Sec. 7163, Rev. C. 1907; re-en. Sec. 9796, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1032; re-en. Sec. 9796, R.C.M. 1935; R.C.M. 1947, 93-8611; amd. Sec. 10, Ch. 466, L. 1979.

25-10-106. Several defendants not united in interest. When there are several defendants in the actions mentioned in 25-10-101, not united in interest and making separate defenses by separate answers, and plaintiff fails to recover judgment against all, the court must award costs to such of the defendants as have judgment in their favor.

History: En. Sec. 474, p. 229, L. 1867; re-en. Sec. 550, p. 148, Cod. Stat. 1871; re-en. Sec. 486, p. 169, L. 1877; re-en. Sec. 486, 1st Div. Rev. Stat. 1879; re-en. Sec. 499, 1st Div. Comp. Stat. 1887; re-en. Sec. 1854, C. Civ. Proc. 1895; re-en. Sec. 7157, Rev. C. 1907; re-en. Sec. 9790, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1026; re-en. Sec. 9790, R.C.M. 1935; R.C.M. 1947, 93-8605.

25-10-107. Costs when tender was made before commencement of action. When, in an action for the recovery of money only, the defendant alleges in his answer that before the commencement of the action he tendered to the plaintiff the full amount to which he was entitled and thereupon deposits in court for plaintiff the amount so tendered and the allegation be found to be true, the plaintiff cannot recover costs but must pay costs to the defendant.

History: En. Sec. 409, p. 127, Bannack Stat.; amd. Sec. 478, p. 229, L. 1867; re-en. Sec. 554, p. 148, Cod. Stat. 1871; re-en. Sec. 491, p. 170, L. 1877; re-en. Sec. 491, 1st Div. Rev. Stat. 1879; re-en. Sec. 504, 1st Div. Comp. Stat. 1887; re-en. Sec. 1858, C. Civ. Proc. 1895; re-en. Sec. 7161, Rev. C. 1907; re-en. Sec. 9794, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1030; re-en. Sec. 9794, R.C.M. 1935; R.C.M. 1947, 93-8609.

25-10-108. Imposing costs on party acting as representative. In an action prosecuted or defended by an executor, administrator, trustee of an express trust, or person expressly authorized by statute, costs may be recovered as in an action by and against a person prosecuting or defending in his own right; but such costs must, by the judgment, be made chargeable only upon the estate, fund, or party represented unless the court directs the same to be paid by the plaintiff or defendant personally for mismanagement or bad faith in the action or defense.

History: En. Sec. 410, p. 127, Bannack Stat.; re-en. Sec. 479, p. 230, L. 1867; re-en. Sec. 555, p. 148, Cod. Stat. 1871; re-en. Sec. 492, p. 170, L. 1877; re-en. Sec. 492, 1st Div. Rev. Stat. 1879; re-en. Sec. 505, 1st Div. Comp. Stat. 1887; re-en. Sec. 1859, C. Civ. Proc. 1895; re-en. Sec. 7162, Rev. C. 1907; re-en. Sec. 9795, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1031; re-en. Sec. 9795, R.C.M. 1935; R.C.M. 1947, 93-8610.

Part 2

Allowable Costs

25-10-201. Costs generally allowable. A party to whom costs are awarded in an action is entitled to include in his bill of costs his necessary disbursements, as follows:

(1) the legal fees of witnesses, including mileage, or referees and other officers;

(2) the expenses of taking depositions;

(3) the legal fees for publication when publication is directed;

(4) the legal fees paid for filing and recording papers and certified copies thereof necessarily used in the action or on the trial;

(5) the legal fees paid stenographers for per diem or for copies;

(6) the reasonable expenses of printing papers for a hearing when required by a rule of court;

(7) the reasonable expenses of making transcript for the supreme court;

(8) the reasonable expenses for making a map or maps if required and necessary to be used on trial or hearing; and

(9) such other reasonable and necessary expenses as are taxable according to the course and practice of the court or by express provision of law.

History: En. Sec. 1866, C. Civ. Proc. 1895; re-en. Sec. 7169, Rev. C. 1907; re-en. Sec. 9802, R.C.M. 1921; re-en. Sec. 9802, R.C.M. 1935; R.C.M. 1947, 93-8618.

25-10-202. Costs of demurrer or motion. In all cases where a demurrer or motion is sustained or overruled, the losing party must pay to the other $10 as costs. If a demurrer or motion be withdrawn before the hearing, it shall be deemed overruled.

History: En. Sec. 1861, C. Civ. Proc. 1895; re-en. Sec. 7164, Rev. C. 1907; re-en. Sec. 9797, R.C.M. 1921; re-en. Sec. 9797, R.C.M. 1935; R.C.M. 1947, 93-8612.

25-10-203. Costs of postponement. When an application is made to the court or referee to postpone a trial, the payment of costs occasioned by the postponement may be imposed, in the discretion of the court or referee, as a condition of granting the same.

History: En. Sec. 408, p. 127, Bannack Stat.; re-en. Sec. 477, p. 229, L. 1867; re-en. Sec. 553, p. 148, Cod. Stat. 1871; re-en. Sec. 490, p. 170, L. 1877; re-en. Sec. 490, 1st Div. Rev. Stat. 1879; re-en. Sec. 503, 1st Div. Comp. Stat. 1887; re-en. Sec. 1857, C. Civ. Proc. 1895; re-en. Sec. 7160, Rev. C. 1907; re-en. Sec. 9793, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1029; re-en. Sec. 9793, R.C.M. 1935; R.C.M. 1947, 93-8608.

25-10-204. Costs of transferring papers — change of venue. The costs and fees of transmitting the pleading and papers when an order is made transferring an action or proceeding for trial and of filing the papers anew must be paid by the party at whose instance the order was made;

except that the party filing the complaint must pay all costs and fees of filing the papers anew and all costs and fees, including reasonable attorneys fees to be fixed by the court, incurred by the defendant by reason of the change of venue motion and hearing when:

(1) the action is an action upon a contract, express or implied, for the direct payment of money and no claim contained in the complaint exceeds $1,000;

(2) the county designated in the complaint is not the proper county; and

(3) the plaintiff will not within 10 days after request stipulate for change of venue and defendant files a motion for such change and such motion is thereafter granted.

History: En. Sec. 64, p. 53, L. 1877; re-en. Sec. 64, 1st Div. Rev. Stat. 1879; re-en. Sec. 64, 1st Div. Comp. Stat. 1887; re-en. Sec. 617, C. Civ. Proc. 1895; re-en. Sec. 6508, Rev. C. 1907; re-en. Sec. 9100, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 399; re-en. Sec. 9100, R.C.M. 1935; amd. Sec. 1, Ch. 176, L. 1971; R.C.M. 1947, 93-2908(part).

25-10-205. Costs of securing witnesses — disqualification of judge. Where an affidavit is filed disqualifying a judge, as provided in [93-2906(4)], after the action or proceeding is set for trial or hearing, the party filing the same shall pay to the opposite party all costs necessarily incurred in securing the attendance of witnesses between the date the order was made fixing the day of hearing or trial and the time the affidavit was filed, and such costs so paid shall not be recoverable in the action or proceeding.

History: En. Sec. 1, Ch. 5, Ex. L. 1903; re-en. Sec. 6511, Rev. C. 1907; re-en. Sec. 9103, R.C.M. 1921; re-en. Sec. 9103, R.C.M. 1935; R.C.M. 1947, 93-2911.

25-10-206. Secretary of state's fee for accepting service of process. The fee of $5 paid by the plaintiff to the secretary of state pursuant to part 6 of chapter 3 and Rule 4D(6), M.R.Civ.P., shall be taxed as part of his costs if he prevails in the action.

History: En. Sec. 5, Ch. 10, L. 1937; amd. Sec. 11, Ch. 117, L. 1961; R.C.M. 1947, 53-205.

Part 3

Attorneys' Fees

25-10-301. Determining compensation of attorneys. The measure and mode of compensation of attorneys and counselors at law is left to agreement, express or implied, of the parties, except that in probate proceedings the court may fix and allow the compensation of attorneys representing administrators, executors, guardians, trustees, and agents appointed by the court. But parties to actions or proceedings are entitled to costs and disbursements as provided by law.

History: En. Sec. 469, p. 228, L. 1867; re-en. Sec. 545, p. 147, Cod. Stat. 1871; re-en. Sec. 481, p. 168, L. 1877; re-en. Sec. 481, 1st Div. Rev. Stat. 1879; re-en. Sec. 494, 1st Div. Comp. Stat. 1887; amd. Sec. 1850, C. Civ. Proc. 1895; re-en. Sec. 7153, Rev. C. 1907; amd. Sec. 1, Ch. 45, L. 1919; re-en. Sec. 9786, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1021; re-en. Sec. 9786, R.C.M. 1935; R.C.M. 1947, 93-8601.

25-10-302. Inclusion of attorney's fees in bill of costs. The attorney's fees mentioned in 30-9-511, 71-1-233, and 71-3-124 need not be included in the cost bill if they are made a part of the judgment.

History: En. Sec. 1865, C. Civ. Proc. 1895; re-en. Sec. 7168, Rev. C. 1907; re-en. Sec. 9801, R.C.M. 1921; re-en. Sec. 9801, R.C.M. 1935; R.C.M. 1947, 93-8617.

Part 4

Officers' Fees, Prepayment

25-10-401. Itemization of officer's fees. No fees of any officer shall e payable until an itemized account of the same, signed by the officer, shall e presented to the person liable therefor.

History: En. Sec. 11, p. 52, L. 1874; re-en. Sec. 815, 1st Div. Rev. Stat. 1879; re-en. Sec. 521, t Div. Comp. Stat. 1887; en. Sec. 1877, C. Civ. Proc. 1895; re-en. Sec. 7180, Rev. C. 1907; re-en. c. 9813, R.C.M. 1921; re-en. Sec. 9813, R.C.M. 1935; R.C.M. 1947, 93-8629.

25-10-402. No charge for copies furnished by party. In all cases here copies of pleadings, affidavits, or other papers are to be served, neither e sheriff nor clerk shall charge or receive a fee for making such copies hen the same are furnished to such officer by the party to the action or his torney.

History: En. Sec. 1905, C. Civ. Proc. 1895; re-en. Sec. 7199, Rev. C. 1907; re-en. Sec. 9832, C.M. 1921; re-en. Sec. 9832, R.C.M. 1935; R.C.M. 1947, 93-8717.

25-10-403. Prepayment of fees. Each party to a civil action is quired to pay the fees fixed by law for the performance of any service or uty by any officer of such court at the instance of such party at the time ich service is rendered, except in the case mentioned in 25-10-405 and 5-10-701; and no such officer is required to perform such service or duty nless the fees fixed therefor are, on demand, first paid or tendered.

History: En. Sec. 565, p. 150, Cod. Stat. 1871; re-en. Sec. 505, p. 173, L. 1877; re-en. Sec. 505, t Div. Rev. Stat. 1879; re-en. Sec. 518, 1st Div. Comp. Stat. 1887; re-en. Sec. 1875, C. Civ. Proc. 395; re-en. Sec. 7178, Rev. C. 1907; re-en. Sec. 9811, R.C.M. 1921; re-en. Sec. 9811, R.C.M. 1935; .C.M. 1947, 93-8627.

25-10-404. Poor persons not required to prepay fees. Any erson, who will file an affidavit stating that he has a good cause of action r defense and that he is unable to pay the costs or procure security to ecure the same, may commence and prosecute or defend an action in any f the courts and administrative tribunals of this state; then it is hereby ade the duty of the officers of the courts and administrative tribunals to sue all writs and serve the same and perform all services in the action with-ut demanding or receiving their fees in advance.

History: En. Sec. 2, p. 71, L. 1869; re-en. Sec. 563, p. 150, Cod. Stat. 1871; amd. Sec. 1, p. 40, x. L. 1873; amd. Sec. 503, p. 173, L. 1877; re-en. Sec. 503, 1st Div. Rev. Stat. 1879; re-en. Sec. 16, 1st Div. Comp. Stat. 1887; re-en. Sec.1873, C. Civ., Proc. 1895; re-en. Sec. 7176, Rev. C. 1907; -en. Sec. 9809, R.C.M. 1921; re-en. Sec. 9809, R.C.M. 1935; amd. Sec. 1, Ch. 71, L. 1971; amd. ec. 1, Ch. 90, L. 1973; R.C.M. 1947, 93-8625.

25-10-405. Governmental entities not required to prepay fees. he state, a county, a municipality, or any subdivision thereof or any officer hen prosecuting or defending an action on behalf of the state, a county, a unicipality, or a subdivision thereof is not required to pay or deposit any e or amount to or with any officer during the prosecution or defense of an ction.

History: En. Sec. 564, p. 150, Cod. Stat. 1871; re-en. Sec. 504, p. 173, L. 1877; re-en. Sec. 504, st Div. Rev. Stat 1879; re-en. Sec. 517, 1st Div. Comp. Stat. 1887; en. Sec. 1874, C. Civ. Proc. 1895; -en. Sec. 7177, Rev. C. 1907; re-en. Sec. 9810, R.C.M. 1921; amd. Sec. 1, Ch. 9, L. 1925; re-en. ec. 9810, R.C.M. 1935; R.C.M. 1947, 93-8626(part).

25-10-406. Collection of clerk's and sheriff's costs after judgment. In all cases, after final judgment, the clerk or sheriff may make ou a bill of costs against the party incurring them, and if not paid within 2 days after demand, execution may issue in the name of the parties to th action for the benefit of the clerk or sheriff.

History: En. Sec. 10, p. 51, L. 1874; re-en. Sec. 814, 1st Div. Rev. Stat. 1879; re-en. Sec. 52 1st Div. Comp. Stat. 1887; en. Sec. 1876, C. Civ. Proc. 1895; re-en. Sec. 7179, Rev. C. 1907; re-en Sec. 9812, R.C.M. 1921; re-en. Sec. 9812, R.C.M. 1935; R.C.M. 1947, 93-8628.

Part 5

Claiming Costs

25-10-501. Bill of costs. The party in whose favor judgment i rendered and who claims his costs must deliver to the clerk and serve upo the adverse party, within 5 days after the verdict or notice of the decisio of the court or referee or, if the entry of the judgment on the verdict or decision be stayed, then before such entry is made, a memorandum of the item of his costs and necessary disbursements in the action or proceeding, whic memorandum must be verified by the oath of the party, his attorney o agent, or the clerk of his attorney, stating that to the best of his knowledg and belief the items are correct and that the disbursements have been necessarily incurred in the action or proceeding.

History: En. Sec. 412, p. 128, Bannack Stat.; amd. Sec. 481, p. 230, L. 1867; re-en. Sec. 557, p 149, Cod. Stat. 1871; amd. Sec. 1, p. 39, Ex. L. 1873; amd. Sec. 9, p. 51, L. 1874; amd. Secs. 494-497 p. 171, L. 1877; re-en. Secs. 494-497, 1st Div. Rev. Stat. 1879; re-en. Secs. 507-510, 1st Div. Comp Stat. 1887; re-en. Sec. 1867, C. Civ. Proc. 1895; re-en. Sec. 7170, Rev. C. 1907; re-en. Sec. 9803 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1033; re-en. Sec. 9803, R.C.M. 1935; R.C.M. 1947 93-8619(part).

25-10-502. Procedure upon objection to bill of costs. A party dissatisfied with the costs claimed may, within 5 days after notice of filing o the bill of costs, file and serve a notice of a motion to have the same taxed by the court in which the judgment was rendered or by the judge thereof at chambers.

History: En. Sec. 412, p. 128, Bannack Stat.; amd. Sec. 481, p. 230, L. 1867; re-en. Sec. 557, p. 149, Cod. Stat. 1871; amd. Sec. 1, p. 39, Ex. L. 1873; amd. Sec. 9, p. 51, L. 1874; amd. Secs. 494-497, p. 171, L. 1877; re-en. Secs. 494-497, 1st Div. Rev. Stat. 1879; re-en. Secs. 507-510, 1st Div. Comp. Stat. 1887; re-en. Sec. 1867, C. Civ. Proc. 1895; re-en. Sec. 7170, Rev. C. 1907; re-en. Sec. 9803, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1033; re-en. Sec. 9803, R.C.M. 1935; R.C.M. 1947, 93-8619(part).

25-10-503. How costs on appeal claimed. Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within 30 days after the remittitur is filed with the clerk below, deliver to such clerk a memorandum of his costs, verified as prescribed in 25-10-501, and thereafter he may have an execution therefor as upon a judgment.

History: En. Sec. 499, p. 172, L. 1877; re-en. Sec. 499, 1st Div. Rev. Stat. 1879; re-en. Sec. 512, 1st Div. Comp. Stat. 1887; re-en. Sec. 1869, C. Civ. Proc. 1895; re-en. Sec. 7172, Rev. C. 1907; re-en. Sec. 9805, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1034; re-en. Sec. 9805, R.C.M. 1935; R.C.M. 1947, 93-8621.

25-10-504. Clerk to include costs in judgment. The clerk must include in the judgment entered up by him the costs, if the same have been axed or ascertained; and he must, within 2 days after the same are taxed r ascertained, if not included in the judgment, insert the same in a blank ft in the judgment for that purpose and must make a similar insertion of e costs in the copies and docket of the judgment.

History: En. Sec. 482, p. 230, L. 1867; re-en. Sec. 558, p. 149, Cod. Stat. 1871; re-en. Sec. 500, 172, L. 1877; re-en. Sec. 500, 1st Div. Rev. Stat. 1879; re-en. Sec. 513, 1st Div. Comp. Stat. 1887; -en. Sec. 1870, C. Civ. Proc. 1895; re-en. Sec. 7173, Rev. C. 1907; re-en. Sec. 9806, R.C.M. 1921; al. C. Civ. Proc. Sec. 1035; re-en. Sec. 9806, R.C.M. 1935; R.C.M. 1947, 93-8622(part).

Part 6

Security for Costs

25-10-601. Security for costs from nonresident plaintiff. When e plaintiff in an action resides out of this state or is a foreign corporation, ecurity for the costs and charges which may be awarded against such plainff may be required by the defendant. When required, all proceedings in the ction must be stayed until an undertaking, executed by two or more perons, is filed with the clerk to the effect that they will pay such costs and harges as may be awarded against the plaintiff by judgment or in the rogress of the action, not exceeding $300. A new or an additional underaking may be ordered by the court or judge upon proof that the original ndertaking is insufficient security and proceedings in the action stayed until uch new or additional undertaking is executed and filed.

History: En. Sec. 414, p. 128, Bannack Stat.; amd. Sec. 483, p. 230, L. 1867; re-en. Sec. 559, p. 49, Cod. Stat. 1871; re-en. Sec. 501, p. 172, L. 1877; re-en. Sec. 501, 1st Div. Rev. Stat. 1879; re-en. ec. 514, 1st Div. Comp. Stat. 1887; re-en. Sec. 1871, C. Civ. Proc. 1895; re-en. Sec. 7174, Rev. C. 907; re-en. Sec. 9807, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1036; re-en. Sec. 9807, R.C.M. 1935; .C.M. 1947, 93-8623.

25-10-602. Dismissal when security not given. After the lapse of 0 days from the service of notice that security is required or of an order for ew or additional security, upon proof thereof and that no undertaking as equired has been filed, the court or judge may order the action to be disissed.

History: En. Sec. 485, p. 230, L. 1867; re-en. Sec. 561, p. 149, Cod. Stat. 1871; re-en. Sec. 502, . 173, L. 1877; re-en. Sec. 502, 1st Div. Rev. Stat. 1879; re-en. Sec. 515, 1st Div. Comp. Stat. 1887; e-en. Sec. 1872, C. Civ. Proc. 1895; re-en. Sec. 7175, Rev. C. 1907; re-en. Sec. 9808, R.C.M. 1921; al. C. Civ. Proc. Sec. 1037; re-en. Sec. 9808, R.C.M. 1935; R.C.M. 1947, 93-8624.

Part 7

Payment of Costs by Governmental Entities

25-10-701. Public officers not to be personally taxed. No officer rosecuting or defending as provided in 25-10-405 shall be taxed with costs r damages, but such costs or damages, if any, shall be taxed to the state, ounty, or municipality, as the case may be.

History: En. Sec. 564, p. 150, Cod. Stat. 1871; re-en. Sec. 504, p. 173, L. 1877; re-en. Sec. 504, st Div. Rev. Stat 1879; re-en. Sec. 517, 1st Div. Comp. Stat. 1887; en. Sec. 1874, C. Civ. Proc. 1895; e-en. Sec. 7177, Rev. C. 1907; re-en. Sec. 9810, R.C.M. 1921; amd. Sec. 1, Ch. 9, L. 1925; re-en. ec. 9810, R.C.M. 1935; R.C.M. 1947, 93-8626(part).

25-10-702. Payment of costs by state. When the state is a part and costs are awarded against it, they must be paid out of the state treasury.

History: En. Sec. 1878, C. Civ. Proc. 1895; re-en. Sec. 7181, Rev. C. 1907; re-en. Sec. 981 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1038; re-en. Sec. 9814, R.C.M. 1935; R.C.M. 1947, 93-8630.

25-10-703. Payment of costs by county. When a county is a part and costs are awarded against it, they must be paid out of the county treasury.

History: En. Sec. 1879, C. Civ. Proc. 1895; re-en. Sec. 7182, Rev. C. 1907; re-en. Sec. 981 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1039; re-en. Sec. 9815, R.C.M. 1935; R.C.M. 1947, 93-8631.

25-10-704 through 25-10-710 reserved.

25-10-711. Award of costs against governmental entity wher suit or defense is frivolous or pursued in bad faith. (1) In any civi action brought by or against the state, a political subdivision, or an agenc of the state or a political subdivision, the opposing party, whether plaintif or defendant, is entitled to the costs enumerated in 25-10-201 and reasonabl attorney's fees as determined by the court if:

(a) he prevails against the state, political subdivision, or agency; and

(b) the court finds that the claim or defense of the state, political subdivision, or agency that brought or defended the action was frivolous or pursued in bad faith.

(2) Costs may be granted pursuant to subsection 1 notwithstanding any other provision of the law to the contrary.

History: En. Sec. 1, Ch. 402, L. 1979.

CHAPTER 11

NEW TRIAL

Part 1 — General Provisions

Section
25-11-101. New trial defined.
25-11-102. Grounds for new trial.
25-11-103. Grounds after trial by the court.
25-11-104. How motion for new trial made.

Part 1

General Provisions

25-11-101. New trial defined. A new trial is a reexamination of an issue of fact in the same court after a trial and decision by a jury or court or by referees.

History: En. Sec. 168, p. 76, Bannack Stat.; en. Sec. 192, p. 171, L. 1867; re-en. Sec. 232, p. 74, Cod. Stat. 1871; re-en. Sec. 284, p. 111, L. 1877; re-en. Sec. 284, 1st Div. Rev. Stat. 1879; re-en. Sec. 295, 1st Div. Comp. Stat. 1887; re-en. Sec. 1170, C. Civ. Proc. 1895; re-en. Sec. 6793, Rev. C. 1907; re-en. Sec. 9395, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 656; re-en. Sec. 9395, R.C.M. 1935; R.C.M. 1947, 93-5601.

25-11-102. Grounds for new trial. The former verdict or other deciion may be vacated and a new trial granted on the application of the party ggrieved for any of the following causes materially affecting the substantial ights of such party:

(1) irregularity in the proceedings of the court, jury, or adverse party or ny order of the court or abuse of discretion by which either party was preented from having a fair trial;

(2) misconduct of the jury. Whenever any one or more of the jurors have een induced to assent to any general or special verdict or to a finding on ny question submitted to them by the court by a resort to the determinaion of chance, such misconduct may be proved by the affidavit of any one f the jurors.

(3) accident or surprise which ordinary prudence could not have guarded gainst;

(4) newly discovered evidence material for the party making the applicaion which he could not, with reasonable diligence, have discovered and prouced at the trial;

(5) excessive damages appearing to have been given under the influence f passion or prejudice;

(6) insufficiency of the evidence to justify the verdict or other decision or hat it is against law;

(7) error in law occurring at the trial and excepted to by the party naking the application;

(8) that the right to have a bill of exceptions has been lost, either through he death or incapacity of the court reporter or in any manner that was not he fault of the losing party.

History: En. Sec. 169, p. 76, Bannack Stat.; amd. Sec. 193, p. 171, L. 1867; re-en. Sec. 233, p. 4, Cod. Stat. 1871; amd. Sec. 285, p. 111, L. 1877; re-en. Sec. 285, 1st Div. Rev. Stat. 1879; amd. ec. 7, p. 10, L. 1881; re-en. Sec. 296, 1st Div. Comp. Stat. 1887; re-en. Sec. 1171, C. Civ. Proc. 1895; e-en. Sec. 6794, Rev. C. 1907; re-en. Sec. 9397, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 657; amd. Sec. , Ch. 68, L. 1935; re-en. Sec. 9397, R.C.M. 1935; R.C.M. 1947, 93-5603.

25-11-103. Grounds after trial by the court. No new trial shall be ranted in equity cases or in cases tried by the court without a jury, except n the grounds mentioned in subsections (1), (3), and (4) of 25-11-102.

History: En. Sec. 5, Ch. 225, L. 1921; re-en. Sec. 9396, R.C.M. 1921; re-en. Sec. 9396, R.C.M. 935; R.C.M. 1947, 93-5602.

25-11-104. How motion for new trial made. (1) Motions for new rials shall be made as follows:

(a) For causes mentioned in 25-11-102(1), the motion shall be made on ffidavits or on the minutes of the court.

(b) For causes mentioned in subsection (2), (3), (4), or (8) of 25-11-102, he motion shall be made only on affidavits.

(c) For causes mentioned in subsection (5), (6), or (7) of 25-11-102, the notion shall be made only on the minutes of the court.

(2) The official stenographic reports of the trial may be referred to as a art of the minutes of the court.

History: En. Sec. 170, p. 77, Bannack Stat.; re-en. Sec. 234, p. 75, Cod. Stat. 1871; amd. Sec. 286, . 112, L. 1877; re-en. Sec. 286, 1st Div. Rev. Stat. 1879; re-en. Sec. 297, 1st Div. Comp. Stat. 1887; e-en. Sec. 1172, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 41, L. 1907; Sec. 6795, Rev. C. 1907; amd. ec. 6, Ch. 225, L. 1921; re-en. Sec. 9398, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 658; amd. Sec. 2, Ch. 68, L. 1935; re-en. Sec. 9398, R.C.M. 1935; R.C.M. 1947, 93-5604.

CHAPTER 12

APPEAL TO SUPREME COURT

Part 1 — General Provisions

Section
25-12-101. Exclusive method of review.
25-12-102. Cases in which appeal may be taken.

Part 1

General Provisions

25-12-101. Exclusive method of review. A judgment or order in a civil action, except when expressly made final by this code, may be reviewed as prescribed by the Rules of Appellate Civil Procedure and not otherwise.

History: En. Sec. 248, p. 94, Bannack Stat.; re-en. Sec. 317, p. 199, L. 1867; re-en. Sec. 366, p. 107, Cod. Stat. 1871; re-en. Sec. 405, p. 149, L. 1877; re-en. Sec. 405, 1st Div. Rev. Stat. 1879; re-en. Sec. 418, 1st Div. Comp. Stat. 1887; re-en. Sec. 1720, C. Civ. Proc. 1895; re-en. Sec. 7096, Rev. C. 1907; re-en. Sec. 9729, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 936; re-en. Sec. 9729, R.C.M. 1935; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966; R.C.M. 1947, 93-8001(part).

25-12-102. Cases in which appeal may be taken. A party aggrieved may appeal in the cases prescribed in the Rules of Appellate Civil Procedure.

History: En. Sec. 248, p. 94, Bannack Stat.; amd. Sec. 319, p. 199, L. 1867; re-en. Sec. 368, p. 107, Cod. Stat. 1871; re-en. Sec. 407, p. 150, L. 1877; re-en. Sec. 407, 1st Div. Rev. Stat. 1879; re-en. Sec. 420, 1st Div. Comp. Stat. 1887; re-en. Sec. 1721, C. Civ. Proc. 1895; re-en. Sec. 7097, Rev. C. 1907; re-en. Sec. 9730, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 938; re-en. Sec. 9730, R.C.M. 1935; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966; R.C.M. 1947, 93-8002(part).

CHAPTER 13

EXECUTION OF JUDGMENT

Part 1 — Right to Enforcement of Judgment

Section
25-13-101. Time limit for issuing execution.
25-13-102. Execution after six years.
25-13-103. Execution after death of a party.
25-13-104. Compelling contribution or repayment — joint debtor, surety.
25-13-105. Compelling repayment — surety on appeal.

Part 2 — Method of Enforcement

25-13-201. Judgments for money or the possession of property.
25-13-202. Judgments requiring the sale of property.
25-13-203. Judgments requiring the performance of specific acts.
25-13-204. Enforcement of order to pay money.
25-13-205. Judgments against county or county officer.

Part 3 — Contents of Writ

25-13-301. Form and contents of writ.

25-13-302. Execution against principal debtor before surety.
25-13-303. Execution when only some of defendants served.
25-13-304. Execution against property of judgment debtor.
25-13-305. Execution of lien on real property.
25-13-306. Execution against property in hands of representative.
25-13-307. Execution requiring delivery of possession of property.
25-13-308. Execution against person of judgment debtor.

Part 4 — Execution and Return of Writ

25-13-401. To whom execution issued.
25-13-402. How writ executed.
25-13-403. Security for sheriff's costs when property seized.
25-13-404. Return of the execution.
25-13-405. Clerk to record returned execution when levy on real property.

Part 5 — Property Subject to Execution

25-13-501. What property subject to execution.
25-13-502. Debts owed to judgment debtor.
25-13-503. Property claimed by third persons.
25-13-504. Garnishment of public officers.
25-13-505. Personal property subject to a security interest.
25-13-506. Duty of secured party.

Part 6 — Property Exempt From Execution

25-13-601. Waiver of exemptions in unsecured note unenforceable.
25-13-602. Special exemption for persons over sixty.
Sections 25-13-603 through 25-13-610 reserved.
25-13-611. Necessary household property.
25-13-612. Property necessary to carry on trade or profession.
25-13-613. Property necessary to carry out governmental functions.
25-13-614. Earnings of judgment debtor.
25-13-615. Homestead.
25-13-616. Life insurance benefits.
25-13-617. Truck or automobile.

Part 7 — Sale on Execution

25-13-701. Notice of sale on execution.
25-13-702. Penalty for selling without notice or destruction of notice.
25-13-703. Postponement of sale.
25-13-704. Conduct of sale.
25-13-705. Procedure when purchaser refuses to pay.
25-13-706. Rejection of subsequent bids after refusal to pay.
25-13-707. Liability of officer after resale.
25-13-708. Conveyance of personal property capable of manual delivery.
25-13-709. Conveyance of personal property not capable of manual delivery.
25-13-710. Real property — what interest transferred.
25-13-711. Real property — certificate of sale.
25-13-712. Property subject to a security interest — disposition of proceeds, security agreement.
25-13-713. Procedure when sale invalidated, revival of judgment.
25-13-714. Validation of defective judicial sales.

Part 8 — Redemption of Real Property

25-13-801. Who may redeem.
25-13-802. Time for redemption — amount to be paid.
25-13-803. Subsequent redemptions — when permitted, amount paid.
25-13-804. Redemption by stockholder or corporation.
25-13-805. Redemption by debtor from spouse.

25-13-806. Notice of redemption, liens, and taxes and assessments paid.
25-13-807. Papers redemptioner must produce.
25-13-808. To whom redemption money paid.
25-13-809. Effect of redemption by debtor or debtor's spouse — certificate of redemption.
25-13-810. When purchaser entitled to conveyance.
25-13-811. Who to execute conveyance.
Sections 25-13-812 through 25-13-820 reserved.
25-13-821. Possession of lands during redemption period.
25-13-822. Rents and profits during redemption period, accounting.
25-13-823. Restraint of waste during redemption period.
25-13-824. Enjoining injury to property after sale and before conveyance.
25-13-825. Damages for injury to property after sale and before conveyance.

Part 1

Right to Enforcement of Judgment

25-13-101. Time limit for issuing execution. The party in whose favor judgment is given may, at any time within 6 years after the entry thereof, have a writ of execution issued for its enforcement.

History: En. Sec. 183, p. 79, Bannack Stat.; re-en. Sec. 209, p. 176, L. 1867; re-en. Sec. 250, p. 80, Cod. Stat. 1871; amd. Sec. 301, p. 118, L. 1877; re-en. Sec. 301, 1st Div. Rev. Stat. 1879; re-en. Sec. 312, 1st Div. Comp. Stat. 1887; amd. Sec. 1210, C. Civ. Proc. 1895; re-en. Sec. 6813, Rev. C. 1907; re-en. Sec. 9416, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 681; re-en. Sec. 9416, R.C.M. 1935; R.C.M. 1947, 93-5801.

25-13-102. Execution after six years. In all cases, the judgment may be enforced or carried into execution after the lapse of 6 years from the date of its entry by leave of the court, upon motion, or by judgment for that purpose founded upon supplemental pleadings.

History: En. Sec. 7, p. 51, L. 1874; re-en. Sec. 813, 1st Div. Rev. Stat. 1879; re-en. Sec. 349, 1st Div. Comp. Stat. 1887; en. Sec. 1215, C. Civ. Proc. 1895; re-en. Sec. 6818, Rev. C. 1907; re-en. Sec. 9421, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 685; re-en. Sec. 9421, R.C.M. 1935; R.C.M. 1947, 93-5807.

25-13-103. Execution after death of a party. Notwithstanding the death of a party after the judgment, execution thereon may be issued or it may be enforced as follows:

(1) In case of the death of the judgment creditor, it may be enforced upon the application of his executor or administrator or successor in interest.

(2) In case of the death of the judgment debtor, if the judgment be for the recovery of real or personal property or the enforcement of a lien thereon, execution may be issued with the same effect as if he were still living.

History: En. Sec. 215, p. 178, L. 1867; re-en. Sec. 256, p. 82, Cod. Stat. 1871; re-en. Sec. 306, p. 120, L. 1877; re-en. Sec. 306, 1st Div. Rev. Stat. 1879; re-en. Sec. 317, 1st Div. Comp. Stat. 1887; re-en. Sec. 1216, C. Civ. Proc. 1895; re-en. Sec. 6819, Rev. C. 1907; re-en. Sec. 9422, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 686; re-en. Sec. 9422, R.C.M. 1935; R.C.M. 1947, 93-5808.

25-13-104. Compelling contribution or repayment — joint debtor, surety. (1) When property liable to an execution against several persons is sold thereon and more than a due proportion of the judgment is satisfied out of the proceeds of the sale of property of one of them or one of them pays, without a sale, more than his proportion, he may compel contribution from the others; and when a judgment is against several and is upon an obligation of one of them as security for another and the surety pays the amount or any part thereof, either by sale of his property or before sale, he may compel repayment from the principal.

(2) In such case, the person so paying or contributing is entitled to the benefit of the judgment to enforce contribution or repayment if, within 10 days after his payment, he file with the clerk of the court where judgment was rendered notice of his payment and claim to contribution or repayment. Upon the filing of such notice, the clerk must make an entry thereof in the margin of the docket.

History: En. Sec. 337, p. 132, L. 1877; re-en. Sec. 337, 1st Div. Rev. Stat. 1879; re-en. Sec. 348, 1st Div. Comp. Stat. 1887; re-en. Sec. 1242, C. Civ. Proc. 1895; re-en. Sec. 6845, Rev. C. 1907; re-en. Sec. 9451, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 709; re-en. Sec. 9451, R.C.M. 1935; R.C.M. 1947, 93-5843.

25-13-105. Compelling repayment — surety on appeal. Whenever any surety on an undertaking on appeal, executed to stay proceedings upon a money judgment, pays the judgment, either with or without action, after its affirmation by the appellate court, he is substituted to the rights of the judgment creditor and is entitled to control, enforce, and satisfy such judgment in all respects as if he had recovered the same.

History: En. Sec. 1903, C. Civ. Proc. 1895; re-en. Sec. 7197, Rev. C. 1907; re-en. Sec. 9830, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1059; re-en. Sec. 9830, R.C.M. 1935; R.C.M. 1947, 93-8715.

Part 2

Method of Enforcement

25-13-201. Judgments for money or the possession of property. When the judgment is for money or the possession of real or personal property, the same may be enforced by a writ of execution; and if the judgment direct that the defendant be arrested, the execution may issue against the person of the judgment debtor after the return of an execution against his property unsatisfied in whole or in part.

History: En. Sec. 213, p. 177, L. 1867; re-en. Sec. 254, p. 81, Cod. Stat. 1871; en. Sec. 305, p. 120, L. 1877; re-en. Sec. 305, 1st Div. Rev. Stat. 1879; re-en. Sec. 316, 1st Div. Comp. Stat. 1887; re-en. Sec. 1214, C. Civ. Proc. 1895; re-en. Sec. 6817, Rev. C. 1907; re-en. Sec. 9420, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 684; re-en. Sec. 9420, R.C.M. 1935; R.C.M. 1947, 93-5805(part).

25-13-202. Judgments requiring the sale of property. When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment or the material parts thereof and directing the proper officer to execute the judgment by making the sale and applying the proceeds in conformity therewith.

History: En. Sec. 213, p. 177, L. 1867; re-en. Sec. 254, p. 81, Cod. Stat. 1871; en. Sec. 305, p. 120, L. 1877; re-en. Sec. 305, 1st Div. Rev. Stat. 1879; re-en. Sec. 316, 1st Div. Comp. Stat. 1887; re-en. Sec. 1214, C. Civ. Proc. 1895; re-en. Sec. 6817, Rev. C. 1907; re-en. Sec. 9420, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 684; re-en. Sec. 9420, R.C.M. 1935; R.C.M. 1947, 93-5805(part).

25-13-203. Judgments requiring the performance of specific acts. (1) When the judgment requires the performance of any other act than those designated in 25-13-201 and 25-13-202, a certified copy of the judgment may be served upon the party against whom the same is rendered or upon the person or officer required thereby or by law to obey the same, and obedience thereto may be enforced by the court.

(2) Where a judgment directs a party to make a deposit or delivery or to convey real property, if the direction is disobeyed, the court, besides punishing the disobedience as a contempt, may by order require the sheriff to take and deposit or deliver the money or other personal property or to convey the real property in conformity with the direction of the court.

History: (1)En. Sec. 213, p. 177, L. 1867; re-en. Sec. 254, p. 81, Cod. Stat. 1871; en. Sec. 305, p. 120, L. 1877; re-en. Sec. 305, 1st Div. Rev. Stat. 1879; re-en. Sec. 316, 1st Div. Comp. Stat. 1887; re-en. Sec. 1214, C. Civ. Proc. 1895; re-en. Sec. 6817, Rev. C. 1907; re-en. Sec. 9420, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 684; re-en. Sec. 9420, R.C.M. 1935; Sec. 93-5805, R.C.M. 1947; (2)En. Sec. 229, P. 95, L. 1877; re-en. Sec. 229, 1st Div. Rev. Stat. 1879; re-en. Sec. 237, 1st Div. Comp. Stat. 1887; amd. Sec. 972, C. Civ. Proc. 1895; re-en. Sec. 6707, Rev. C. 1907; re-en. Sec. 9310, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 574; re-en. Sec. 9310, R.C.M. 1935; Sec. 93-4504, R.C.M. 1947; R.C.M. 1947, 93-4504(part), 93-5805(part).

25-13-204. Enforcement of order to pay money. Whenever an order for the payment of a sum of money is made by a court or judge pursuant to the provisions of this code, it may be enforced by execution in the same manner as if it were a judgment.

History: En. Sec. 473, p. 166, L. 1877; re-en. Sec. 473, 1st Div. Rev. Stat. 1879; re-en. Sec. 486, 1st Div. Comp. Stat. 1887; re-en. Sec. 1825, C. Civ. Proc. 1895; re-en. Sec. 7144, Rev. C. 1907; re-en. Sec. 9777, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1007; re-en. Sec. 9777, R.C.M. 1935; R.C.M. 1947, 93-5806.

25-13-205. Judgments against county or county officer. When a judgment is rendered against the county or against any county officer in an action prosecuted against him in his name of office, when the same is to be paid by the county, no execution must issue upon the judgment, but the same must be paid as other county charges. When so collected, the same must be paid by the county treasurer to the proper person to whom the same is adjudged, upon the delivery of a proper voucher therefor.

History: En. Sec. 342, 5th Div. Rev. Stat. 1879; re-en. Sec. 751, 5th Div. Comp. Stat. 1887; amd. Sec. 4199, Pol. C. 1895; re-en. Sec. 2879, Rev. C. 1907; re-en. Sec. 4450, R.C.M. 1921; re-en. Sec. 4450, R.C.M. 1935; R.C.M. 1947, 16-811.

Part 3

Contents of Writ

25-13-301. Form and contents of writ. (1) The writ of execution must:

(a) be issued in the name of the state of Montana, sealed with the seal of the court, and subscribed by the clerk;

(b) be directed to the sheriff;

(c) intelligibly refer to the judgment, stating the court, the county where the judgment roll is filed, and if it be for money, the amount thereof and the amount actually due thereon; and

(d) require the sheriff to act substantially as provided in this part.

(2) In executions, the amount thereof must be computed and stated as near as may be in dollars and cents, rejecting fractions of a cent.

History: (1)En. Sec. 184, p. 79, Bannack Stat.; re-en. Sec. 210, p. 176, L. 1867; re-en. Sec. 251, p. 80, Cod. Stat. 1871; re-en. Sec. 302, p. 118, L. 1877; re-en. Sec. 302, 1st Div. Rev. Stat. 1879; re-en.

Sec. 313, 1st Div. Comp. Stat. 1887; amd. Sec. 1211, C. Civ. Proc. 1895; re-en. Sec. 6814, Rev. C. 1907; re-en. Sec. 9417, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 682; re-en. Sec. 9417, R.C.M. 1935; Sec. 93-5802, R.C.M. 1947; (2)En. Sec. 3152, Pol. C. 1895; re-en. Sec. 2035, Rev. C. 1907; re-en. Sec. 4285, R.C.M. 1921; Cal. Pol. C. Sec. 3274; re-en. Sec. 4285, R.C.M. 1935; Sec. 93-4710, R.C.M. 1947; R.C.M. 1947, 93-4710(part), 93-5802(part).

25-13-302. Execution against principal debtor before surety. Upon the rendition of any judgment, if it shall be shown that one or more of the defendants against whom the judgment is to be rendered are principal debtors and others of the said defendants are sureties of such principal debtor, the court may order the judgment so to state, and upon the issuance of an execution upon such judgment, it shall direct the sheriff to make the amount due thereon out of the goods and chattels, lands and tenements of the principal debtor or debtors or, if sufficient thereof cannot be found within his county to satisfy the same, to levy and make the same out of the property, personal or real, of the judgment debtor who was surety.

History: En. Sec. 118, p. 67, Bannack Stat.; re-en. Sec. 145, p. 161, L. 1867; re-en. Sec. 181, p. 62, Cod. Stat. 1871; re-en. Sec. 231, p. 95, L. 1877; re-en. Sec. 231, 1st. Div. Rev. Stat. 1879; re-en. Sec. 239, 1st Div. Comp. Stat. 1887; re-en. Sec. 1001, C. Civ. Proc. 1895; re-en. Sec. 6711, Rev. C. 1907; re-en. Sec. 9314, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 578; re-en. Sec. 9314, R.C.M. 1935; R.C.M. 1947, 93-4702(part).

25-13-303. Execution when only some of defendants served. When a writ of execution is issued on a judgment recovered against two or more persons in an action upon a joint contract, in which action all the defendants were not served with summons or did not appear, it must direct the sheriff to satisfy the judgment out of the joint property of all the defendants and the individual property only of the defendants who were served or who appeared in the action.

History: En. Sec. 185, p. 80, Bannack Stat.; amd. Sec. 211, p. 177, L. 1867; re-en. Sec. 252, p. 81, Cod. Stat. 1871; re-en. Sec. 303, p. 119, L. 1877; re-en. Sec. 303, 1st Div. Rev. Stat. 1879; re-en. Sec. 314, 1st Div. Comp. Stat. 1887; re-en. Sec. 1212, C. Civ. Proc. 1895; re-en. Sec. 6815, Rev. C. 1907; re-en. Sec. 9418, R.C.M. 1921; re-en. Sec. 9418, R.C.M. 1935; R.C.M. 1947, 93-5803.

25-13-304. Execution against property of judgment debtor. If the writ be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment, with interest, out of the personal property of such debtor and, if sufficient personal property cannot be found, out of his real property.

History: En. Sec. 184, p. 79, Bannack Stat.; re-en. Sec. 210, p. 176, L. 1867; re-en. Sec. 251, p. 80, Cod. Stat. 1871; re-en. Sec. 302, p. 118, L. 1877; re-en. Sec. 302, 1st Div. Rev. Stat. 1879; re-en. Sec. 313, 1st Div. Comp. Stat. 1887; amd. Sec. 1211, C. Civ. Proc. 1895; re-en. Sec. 6814, Rev. C. 1907; re-en. Sec. 9417, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 682; re-en. Sec. 9417, R.C.M. 1935; R.C.M. 1947, 93-5802(part).

25-13-305. Execution of lien on real property. If the judgment be a lien upon real property, the writ shall require the sheriff to satisfy the judgment, with interest, out of the real property belonging to the judgment debtor on the day when the judgment was docketed or at any time thereafter or, if the execution be issued to a county other than the one in which the judgment was recovered, on the day when the transcript of the docket was filed in the office of the clerk of the district court of such county, stating such day, or any time thereafter.

History: En. Sec. 184, p. 79, Bannack Stat.; re-en. Sec. 210, p. 176, L. 1867; re-en. Sec. 251, p. 80, Cod. Stat. 1871; re-en. Sec. 302, p. 118, L. 1877; re-en. Sec. 302, 1st Div. Rev. Stat. 1879; re-en.

Sec. 313, 1st Div. Comp. Stat. 1887; amd. Sec. 1211, C. Civ. Proc. 1895; re-en. Sec. 6814, Rev. C. 1907; re-en. Sec. 9417, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 682; re-en. Sec. 9417, R.C.M. 1935; R.C.M. 1947, 93-5802(part).

25-13-306. Execution against property in hands of representative. If the writ be against real or personal property in the hands of the personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, it shall require the sheriff to satisfy the judgment, with interest, out of such property.

History: En. Sec. 184, p. 79, Bannack Stat.; re-en. Sec. 210, p. 176, L. 1867; re-en. Sec. 251, p. 80, Cod. Stat. 1871; re-en. Sec. 302, p. 118, L. 1877; re-en. Sec. 302, 1st Div. Rev. Stat. 1879; re-en. Sec. 313, 1st Div. Comp. Stat. 1887; amd. Sec. 1211, C. Civ. Proc. 1895; re-en. Sec. 6814, Rev. C. 1907; re-en. Sec. 9417, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 682; re-en. Sec. 9417, R.C.M. 1935; R.C.M. 1947, 93-5802(2).

25-13-307. Execution requiring delivery of possession of property. If the writ be for the delivery of the possession of real or personal property, it must require the sheriff to deliver the possession of the same, particularly describing it, to the party entitled thereto and may at any time require the sheriff to satisfy any costs, damages, rents, or profits recovered by the same judgment out of the personal property of the person against whom it was rendered, the value of the property for which the judgment was rendered to be specified therein, if a delivery cannot be had, and if sufficient personal property cannot be found, then out of the real property, as provided in 25-13-305.

History: En. Sec. 184, p. 79, Bannack Stat.; re-en. Sec. 210, p. 176, L. 1867; re-en. Sec. 251, p. 80, Cod. Stat. 1871; re-en. Sec. 302, p. 118, L. 1877; re-en. Sec. 302, 1st Div. Rev. Stat. 1879; re-en. Sec. 313, 1st Div. Comp. Stat. 1887; amd. Sec. 1211, C. Civ. Proc. 1895; re-en. Sec. 6814, Rev. C. 1907; re-en. Sec. 9417, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 682; re-en. Sec. 9417, R.C.M. 1935; R.C.M. 1947, 93-5802(4).

25-13-308. Execution against person of judgment debtor. If the writ be against the person of the judgment debtor, it must require the sheriff to arrest such debtor and commit him to the jail of the county until he pay the judgment, with interest, or be discharged, according to law.

History: En. Sec. 184, p. 79, Bannack Stat.; re-en. Sec. 210, p. 176, L. 1867; re-en. Sec. 251, p. 80, Cod. Stat. 1871; re-en. Sec. 302, p. 118, L. 1877; re-en. Sec. 302, 1st Div. Rev. Stat. 1879; re-en. Sec. 313, 1st Div. Comp. Stat. 1887; amd. Sec. 1211, C. Civ. Proc. 1895; re-en. Sec. 6814, Rev. C. 1907; re-en. Sec. 9417, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 682; re-en. Sec. 9417, R.C.M. 1935; R.C.M. 1947, 93-5802(3).

Part 4

Execution and Return of Writ

25-13-401. To whom execution issued. Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county in the state. Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property or some part thereof is situated. Executions may be issued at the same time to different counties.

History: En. Sec. 216, p. 178, L. 1867; re-en. Sec. 257, p. 82, Cod. Stat. 1871; re-en. Sec. 307, p. 120, L. 1877; re-en. Sec. 307, 1st Div. Rev. Stat. 1879; re-en. Sec. 318, 1st Div. Comp. Stat. 1887; re-en. Sec. 1217, C. Civ. Proc. 1895; re-en. Sec. 6820, Rev. C. 1907; re-en. Sec. 9423, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 687; re-en. Sec. 9423, R.C.M. 1935; R.C.M. 1947, 93-5809.

25-13-402. How writ executed. The sheriff must execute the writ gainst the property of the judgment debtor by levying on a sufficient mount of property, if there be sufficient, collecting or selling the things in ction, and selling the other property and paying to the plaintiff or his attor-ey so much of the proceeds as will satisfy the judgment. Any excess in the roceeds over the judgment and accruing costs must be returned to the judg-nent debtor unless otherwise directed by the judgment or order of the court. Vhen there is more property of the judgment debtor than is sufficient to atisfy the judgment and accruing costs within the view of the sheriff, he nust levy only on such part of the property as the judgment debtor may ndicate if the property indicated be amply sufficient to satisfy the judgment nd costs.

History: En. Sec. 198, p. 83, Bannack Stat.; re-en. Sec. 220, p. 180, L. 1867; re-en. Sec. 270, p. 5, Cod. Stat. 1871; amd. Sec. 320, p. 125, L. 1877; re-en. Sec. 320, 1st Div. Rev. Stat. 1879; re-en. ec. 331, 1st Div. Comp. Stat. 1887; re-en. Sec. 1224, C. Civ. Proc. 1895; re-en. Sec. 6827, Rev. C. 907; re-en. Sec. 9431, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 691; re-en. Sec. 9431, R.C.M. 1935; .C.M. 1947, 93-5823.

25-13-403. Security for sheriff's costs when property seized. If he sheriff will incur substantial costs in transporting, keeping, or storing the roperty seized, the party requesting service of a writ of execution shall pro-ide a bond or other security to pay for all costs which may be incurred as result of the service of such writ.

History: En. Sec. 4393, Pol. C. 1895; re-en. Sec. 3022, Rev. C. 1907; re-en. Sec. 4786, R.C.M. 921; Cal. Pol. C. Sec. 4185; re-en. Sec. 4786, R.C.M. 1935; amd. Sec. 1, Ch. 426, L. 1977; R.C.M. 947, 16-2714(part).

25-13-404. Return of the execution. The execution may be made eturnable, at any time not less than 10 or more than 60 days after its receipt y the sheriff, to the clerk with whom the judgment roll is filed. When the xecution is returned, the clerk must attach it to the judgment roll.

History: En. Sec. 212, p. 177, L. 1867; re-en. Sec. 253, p. 81, Cod. Stat. 1871; amd. Sec. 20, p. 7, L. 1874; re-en. Sec. 304, p. 119, L. 1877; re-en. Sec. 304, 1st Div. Rev. Stat. 1879; re-en. Sec. 15, 1st Div. Comp. Stat. 1887; re-en. Sec. 1213, C. Civ. Proc. 1895; re-en. Sec. 6816, Rev. C. 1907; e-en. Sec. 9419, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 683; re-en. Sec. 9419, R.C.M. 1935; R.C.M. 947, 93-5804(part).

25-13-405. Clerk to record returned execution when levy on eal property. If any real estate be levied upon, the clerk must record the xecution and the return thereto at large and certify the same under his and as true copies in a book to be called the "execution book", which must e indexed, with the names of the plaintiffs and defendants in execution lphabetically arranged, and kept open at all times during office hours for he inspection of the public, without charge. It is evidence of the contents f the originals whenever they or any part thereof may be destroyed or muti-ated.

History: En. Sec. 212, p. 177, L. 1867; re-en. Sec. 253, p. 81, Cod. Stat. 1871; amd. Sec. 20, p. 7, L. 1874; re-en. Sec. 304, p. 119, L. 1877; re-en. Sec. 304, 1st Div. Rev. Stat. 1879; re-en. Sec. 15, 1st Div. Comp. Stat. 1887; re-en. Sec. 1213, C. Civ. Proc. 1895; re-en. Sec. 6816, Rev. C. 1907; e-en. Sec. 9419, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 683; re-en. Sec. 9419, R.C.M. 1935; R.C.M. 947, 93-5804(part).

Part 5

Property Subject to Execution

25-13-501. What property subject to execution. All goods, chattels, moneys, and other property, both real and personal, or any interest therein of the judgment debtor, not exempt by law, and all property and rights of property seized and held under attachment in the action are liable to execution. Shares and interest in any corporation or company, debts and credits, and all other property, both real and personal, or any interest in either real or personal property, and all other property not capable of manual delivery may be attached on execution, in like manner as upon writs of attachment. Gold dust must be returned by the officer as so much money collected, at its current value, without exposing the same to sale. Until a levy, property is not affected by the execution.

History: En. Sec. 192, p. 81, Bannack Stat.; amd. Sec. 217, p. 178, L. 1867; re-en. Sec. 258, p. 82, Cod. Stat. 1871; re-en. Sec. 308, p. 121, L. 1877; re-en. Sec. 308, 1st Div. Rev. Stat. 1879; re-en. Sec. 319, 1st Div. Comp. Stat. 1887; re-en. Sec. 1218, C. Civ. Proc. 1895; re-en. Sec. 6821, Rev. C. 1907; re-en. Sec. 9424, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 688; re-en. Sec. 9424, R.C.M. 1935; R.C.M. 1947, 93-5810.

25-13-502. Debts owed to judgment debtor. After the issuing of an execution against property and before its return, any person indebted to the judgment debtor may pay to the sheriff the amount of his debt or so much thereof as may be necessary to satisfy the execution; and the sheriff's receipt is sufficient discharge for the amount so paid.

History: En. Sec. 217, p. 88, Bannack Stat.; re-en. Sec. 240, p. 184, L. 1867; re-en. Sec. 289, Cod. Stat. 1871; re-en. Sec. 340, p. 134, L. 1877; re-en. Sec. 340, 1st Div. Rev. Stat. 1879; re-en. Sec. 352, 1st Div. Comp. Stat. 1887; re-en. Sec. 1262, C. Civ. Proc. 1895; re-en. Sec. 6850, Rev. C. 1907; re-en. Sec. 9456, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 716; re-en. Sec. 9456, R.C.M. 1935; R.C.M. 1947, 93-5903.

25-13-503. Property claimed by third persons. If personal property levied upon be claimed by a third person, the same proceedings shall be had as provided in attachment in 27-18-602.

History: En. Sec. 1220, C. Civ. Proc. 1895; re-en. Sec. 6823, Rev. C. 1907; re-en. Sec. 9426, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 689; re-en. Sec. 9426, R.C.M. 1935; R.C.M. 1947, 93-5812.

25-13-504. Garnishment of public officers. The provisions of 27-18-406, relating to the garnishment of public officers, apply to the levy of an execution.

History: En. Sec. 1243, C. Civ. Proc. 1895; re-en. Sec. 6846, Rev. C. 1907; re-en. Sec. 9452, R.C.M. 1921; re-en. Sec. 9452, R.C.M. 1935; R.C.M. 1947, 93-5844.

25-13-505. Personal property subject to a security interest. Personal property subject to a security interest may be taken on execution issued at the suit of a creditor of the debtor under the security agreement; but before the property is so taken, the officer levying the writ must pay or tender to the secured party the amount of the security agreement debt and interest or must deposit the same with the county treasurer of the county in which the financing statement covering the security agreement is filed, if such statement is filed with a county clerk and recorder, or if such statement is filed with another filing officer pursuant to law, then with such other filing officer, payable to the order of the secured party.

History: En. Sec. 1, Ch. 111, L. 1921; re-en. Sec. 9291, R.C.M. 1921; re-en. Sec. 9291, R.C.M. 1935; amd. Sec. 11-162, Ch. 264, L. 1963; R.C.M. 1947, 93-4338(part).

25-13-506. Duty of secured party. (1) The secured party under any security agreement of record shall, upon 15 days' notice in writing served upon him in person by any creditor of the debtor seeking to satisfy a judgment of such creditor against the debtor, be required to make and file in the office of the county clerk and recorder or other filing officer with whom the financing statement covering the security agreement is filed an affidavit showing the amount of the indebtedness then actually due and owing to the secured party; and such affidavit shall state the amount of the original obligation for which the security agreement was given as security, all additional advancement of money or property on the principal obligation since the date of the execution of the security agreement, all payments of whatsoever kind, whether on principal or interest, made by the debtor to the date of the execution of such affidavit by the secured party, and the balance then remaining due and unpaid to the secured party. If within 15 days from the service of any such demand in writing on the secured party by any creditor of the debtor, the secured party shall fail, refuse, or neglect to file the affidavit herein required, the security agreement shall be of no force or effect as against such creditor upon the seizure of any such personal property on execution.

(2) In the event the amount shown to be due is paid to the county treasurer or to a filing officer, as aforesaid, or to the secured party in satisfaction of the security agreement by any execution creditor against the debtor, the secured party shall be required to surrender to the county treasurer or such filing officer the security agreement and any note or other evidence of indebtedness secured thereby, which security agreement or other evidence of indebtedness shall be delivered by the secured party, county treasurer, or filing officer to the execution creditor.

History: En. Sec. 1, Ch. 111, L. 1921; re-en. Sec. 9291, R.C.M. 1921; re-en. Sec. 9291, R.C.M. 1935; amd. Sec. 11-162, Ch. 264, L. 1963; R.C.M. 1947, 93-4338(part).

Part 6

Property Exempt From Execution

25-13-601. Waiver of exemptions in unsecured note unenforceable. Any waiver of statutory exemption from execution in an unsecured promissory note shall be unenforceable.

History: En. Sec. 1, Ch. 172, L. 1965; R.C.M. 1947, 93-5813.1.

25-13-602. Special exemption for persons over sixty. An unmarried man or woman over the age of 60 years shall be allowed the same exemptions as are granted to the head of a family under the laws of the state of Montana.

History: En. Sec. 1, Ch. 120, L. 1933; re-en. Sec. 9430.1, R.C.M. 1935; R.C.M. 1947, 93-5819.

25-13-603 through 25-13-610 reserved.

25-13-611. Necessary household property. (1) The following property is exempt from execution, except as herein otherwise provided:

(a) all wearing apparel of the judgment debtor and family;

(b) all chairs, tables, desks, and books to the value of $200;

(c) all necessary household, table, and kitchen furniture of the judgment debtor, including one sewing machine, stoves, stovepipes, and stove furniture, heating apparatus, beds, bedding, and bedsteads, and provisions and fuel provided for individual or family use sufficient for 3 months;

(d) 1 horse, saddle, and bridle; 2 cows and their calves; 4 hogs; 50 domestic fowls, and feed for such animals for 3 months;

(e) one clock; and

(f) all family pictures.

(2) An unmarried person who is not the head of a family is not entitled to any of the exemptions herein mentioned, except that of the wearing apparel of the judgment debtor.

(3) None of the property mentioned in this section is exempt from execution issued upon a judgment recovered for its price or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona fide resident of this state shall have the benefit of these exemptions.

History: En. Sec. 1, Ch. 8, L. 1905; re-en. Sec. 6824, Rev. C. 1907; amd. Sec. 1, Ch. 232, L. 1921; re-en. Sec. 9427, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 690; re-en. Sec. 9427, R.C.M. 1935; R.C.M. 1947, 93-5813.

25-13-612. Property necessary to carry on trade or profession. (1) In addition to the property mentioned in 25-13-611, there shall be exempt to all judgment debtors who are married or who are heads of families the following property:

(a) to a farmer: farming utensils or implements of husbandry, not exceeding in value $600; two oxen or two horses or mules and their harness, one cart or wagon, set of sleds, and food for such oxen, horses, cows, or mules for 3 months; all seed, grain, or vegetables actually provided or on hand for the purpose of planting or sowing the following spring, not exceeding in value $200;

(b) to a mechanic or artisan: tools or implements necessary to carry on his trade;

(c) to a surgeon, physician, or dentist: the instruments and chest necessary to the exercise of his profession, with his scientific and professional libraries and necessary office furniture;

(d) to attorneys at law and ministers of the gospel, etc.: the professional libraries of attorneys, counselors, judges, ministers of the gospel, editors, schoolteachers, and music teachers and their necessary office furniture; the musical instruments of music teachers; the notarial seal, records, and office furniture of a notary public;

(e) to a miner: his cabin or dwelling, sluices, and pipes, hose, windlass, derricks, cars, pumps, tools, implements, and appliances necessary for carrying on any kind of mining operations, not exceeding in value the aggregate sum of $1,000; and one horse or mule with harness and food for such horse or mule for 3 months, when such horse or mule is used in working his mine or mining claim;

(f) to a civil, mining, or mechanical engineer: instruments, tools, books, and records necessary to carry on his profession;

(g) to a chemist or assayer: the tools, instruments, and supplies necessary to carry on his profession;

(h) to a cartman, hackman, huckster, peddler, teamster, or laborer: one horse or mule and harness for two animals or two oxen and harness, and one cart or wagon, one dray or truck, one hack or carriage by the use of which such person habitually earns his living;

(i) one vehicle and harness or other equipment used by a physician or surgeon or minister of the gospel in making his professional visits, with food for such horse, mule, or oxen for 3 months;

(j) to an osteopath or chiropractor: the instruments and equipment necessary to the exercise of his profession, with his scientific and professional library and necessary office furniture.

(2) No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona fide resident of this state shall have the benefit of these exemptions. No person can claim more than one of the exemptions mentioned in subsections (1)(a) through (1)(i) of this section.

History: Ap. p. Sec. 1222, C. Civ. Proc. 1895; amd. Sec. 2, Ch. 8, L. 1905; re-en. Sec. 6825, Rev. C. 1907; re-en. Sec. 9428, R.C.M. 1921; re-en. Sec. 9428, R.C.M. 1935; Sec. 93-5814, R.C.M. 1947; Ap. p. Sec. 1, Ch. 127, L. 1937; re-en. Sec. 9428.1, R.C.M. 1935; Sec. 93-5815, R.C.M. 1947; R.C.M. 1947, 93-5814(part), 93-5815.

25-13-613. Property necessary to carry out governmental functions. (1) In addition to the property mentioned in 25-13-611, there shall be exempt to all judgment debtors who are married or who are heads of families the following property:

(a) all fire engines, hooks, and ladders, with the cart, trucks, and carriages, hose, buckets, implements, and apparatus thereto appertaining, and all furniture and uniforms of any fire company or department organized under any laws of this state;

(b) all arms, uniforms, and accouterments required by law to be kept by any person and one gun to be selected by the debtor;

(c) all courthouses, jails, public offices, and buildings, lots, grounds, and personal property, the fixtures, furniture, books, papers, and appurtenances belonging and pertaining to the courthouse, jail, and public offices belonging to any county of this state; and

(d) all cemeteries, public squares, parks, and places, public buildings, town halls, public markets, buildings for the use of fire departments and military organizations, and the lots and grounds thereto belonging and appertaining owned or held by any town or incorporated city or dedicated by such city or town to health, ornament, or public use or for the use of any fire or military company organized under the laws of the state.

(2) No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona fide resident of this state shall have the benefit of these exemptions.

History: En. Sec. 1222, C. Civ. Proc. 1895; amd. Sec. 2, Ch. 8, L. 1905; re-en. Sec. 6825, Rev. C. 1907; re-en. Sec. 9428, R.C.M. 1921; re-en. Sec. 9428, R.C.M. 1935; R.C.M. 1947, 93-5814(part).

25-13-614. Earnings of judgment debtor. (1) The earnings of the judgment debtor for his personal services rendered at any time within 45 days next preceding the levy of execution or attachment, when it appears by the debtor's affidavit or otherwise that such earnings are necessary for the use of his family supported in whole or in part by his labor, are exempt; bu where debts are incurred by any such person or his wife or family for gasoline and for the common necessaries of life, then the one-half of such earnings are nevertheless subject to execution, garnishment, and attachment to satisfy debts so incurred.

(2) The words "his family", as used in this section, are to be construed with the words "head of family", as used in 70-32-102.

History: En. Sec. 1222, C. Civ. Proc. 1895; re-en. Sec. 6825, Rev. C. 1907; amd. Sec. 1, Ch. 48 L. 1913; re-en. Sec. 9429, R.C.M. 1921; amd. Sec. 1, Ch. 3, L. 1933; re-en. Sec. 9429, R.C.M. 1935 amd. Sec. 1, Ch. 77, L. 1939; R.C.M. 1947, 93-5816.

25-13-615. Homestead. The homestead of a judgment debtor exempt from execution is provided for in Title 70, chapter 32.

History: En. Sec. 1223, C. Civ. Proc. 1895; re-en. Sec. 6826, Rev. C. 1907; re-en. Sec. 9430 R.C.M. 1921; re-en. Sec. 9430, R.C.M. 1935; R.C.M. 1947, 93-5818.

25-13-616. Life insurance benefits. (1) In addition to the property mentioned in 25-13-611, there shall be exempt to all judgment debtors who are married or who are heads of families all moneys, benefits, privileges, or immunities accruing or in any manner growing out of any life insurance on the life of the debtor if the annual premiums paid do not exceed $500.

(2) No article, however, or species of property mentioned in this section is exempt from execution issued upon a judgment recovered for its price or upon a judgment of foreclosure of a mortgage lien thereon, and no person not a bona fide resident of this state shall have the benefit of these exemptions.

History: En. Sec. 1222, C. Civ. Proc. 1895; amd. Sec. 2, Ch. 8, L. 1905; re-en. Sec. 6825, Rev. C. 1907; re-en. Sec. 9428, R.C.M. 1921; re-en. Sec. 9428, R.C.M. 1935; R.C.M. 1947, 93-5814(part).

25-13-617. Truck or automobile. (1) In addition to all other exemptions, one truck or automobile of the value of not more than $300 is exempt from attachment or execution where the debtor is the head of a family or over 60 years of age; but where debts are incurred by any such debtor or his wife or family for the common necessaries of life, then such truck or automobile is nevertheless subject to attachment and execution to satisfy debts so incurred.

(2) The words "his family", as used in this section, are to be construed with the words "head of family", as used in 70-32-102.

History: En. Sec. 2, Ch. 120, L. 1933; re-en. Sec. 9430.2, R.C.M. 1935; amd. Sec. 1, Ch. 48, L. 1941; R.C.M. 1947, 93-5820.

Part 7

Sale on Execution

25-13-701. Notice of sale on execution. (1) Before the sale of the property on execution, notice thereof must be given as follows:

(a) in case of perishable property, by posting written notice of the time and place of the sale in three public places of the township or city where the sale is to take place, for such time as may be reasonable considering the character and condition of the property;

(b) in case of other personal property, by posting a similar notice in three ublic places in the township or city where the sale is to take place, for not ess than 5 days or more than 10 days;

(c) in case of real property, by posting a similar notice, particularly escribing the property, for 20 days in three public places of the township r city where the property is situated and also where the property is to be old, which may be either at the courthouse or on the premises, and publishng a copy thereof once a week for the same period in some newspaper pubished in the county, if there be one, which notice shall be substantially as ollows:

SHERIFF'S SALE

.., Plaintiff,
vs.
.., Defendant,

To be sold at sheriff's sale on the .... day of ...., 19.., at .... (Here nsert brief description of property.)

Signed ...., Sheriff

(2) Any sheriff publishing a notice not in accordance with the form set orth in subsection (1)(c) and which shall cost more than such a notice shall ot be entitled to any costs for publication of the same but shall be personlly liable for the payment of such publication.

History: En. Sec. 199, p. 83, Bannack Stat.; amd. Sec. 221, p. 180, L. 1867; re-en. Sec. 271, p. 6, Cod. Stat. 1871; amd. Sec. 20, p. 57, L. 1874; re-en. Sec. 321, p. 126, L. 1877; re-en. Sec. 321, st Div. Rev. Stat. 1879; re-en. Sec. 332, 1st Div. Comp. Stat. 1887; amd. Sec. 1225, C. Civ. Proc. 895; re-en. Sec. 6828, Rev. C. 1907; re-en. Sec. 9432, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 692; re-en. ec. 9432, R.C.M. 1935; R.C.M. 1947, 93-5824.

25-13-702. Penalty for selling without notice or destruction of otice. An officer selling without the notice prescribed by 25-13-701 forfeits 500 to the aggrieved party in addition to his actual damages; and a person villfully taking down or defacing the notice posted, if done before the sale r satisfaction of the judgment (if the judgment be satisfied before sale), foreits $500.

History: En. Sec. 200, p. 84, Bannack Stat.; re-en. Sec. 222, p. 180, L. 1867; re-en. Sec. 272, p. 6, Cod. Stat. 1871; re-en. Sec. 322, p. 127, L. 1877; re-en. Sec. 322, 1st Div. Rev. Stat. 1879; re-en. ec. 333, 1st Div. Comp. Stat. 1887; re-en. Sec. 1226, C. Civ. Proc. Sec. 1895; re-en. Sec. 6829, Rev. . 1907; re-en. Sec. 9433, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 693; re-en. Sec. 9433, R.C.M. 1935; .C.M. 1947, 93-5825.

25-13-703. Postponement of sale. Good cause therefor appearing, he officer holding the execution may postpone any sale noticed thereunder or a period not exceeding 15 days, by public proclamation at the time and lace fixed in the notice of sale and by posting a notice in three public places n the township where the property has previously been noticed to be sold.

History: En. Sec. 1, Ch. 120, L. 1915; re-en. Sec. 9435, R.C.M. 1921; re-en. Sec. 9435, R.C.M. 935; R.C.M. 1947, 93-5827.

25-13-704. Conduct of sale. (1) All sales of property under execution nust be made at auction to the highest bidder, between the hours of 9 a.m. nd 5 p.m. After sufficient property has been sold to satisfy the execution, o more can be sold. Neither the officer holding the execution nor his deputy an become a purchaser or be interested in any purchase at such sale.

(2) When the sale is of personal property capable of manual delivery, it must be within view of those who attend the sale and be sold in such parcels as are likely to bring the highest price; and when the sale is of real property consisting of several known lots or parcels, they must be sold separately, or when a portion of such real property is claimed by a third person and he requires it to be sold separately, such portion must be thus sold. The judgment debtor, if present at the sale, may also direct the order in which property, real or personal, shall be sold when such property consists of several known lots or parcels or of articles which can be sold to advantage separately, and the sheriff must follow such directions.

History: En. Sec. 201, p. 84, Bannack Stat.; amd. Sec. 223, p. 180, L. 1867; re-en. Sec. 273, p. 86, Cod. Stat. 1871; re-en. Sec. 323, p. 127, L. 1877; re-en. Sec. 323, 1st Div. Rev. Stat. 1879; re-en. Sec. 334, 1st Div. Comp. Stat. 1887; re-en. Sec. 1227, C. Civ. Proc. 1895; re-en. Sec. 6830, Rev. C. 1907; re-en. Sec. 9434, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 694; re-en. Sec. 9434, R.C.M. 1935; R.C.M. 1947, 93-5826.

25-13-705. Procedure when purchaser refuses to pay. If a purchaser refuses to pay the amount bid by him for the property struck off to him at a sale under execution, the officer may again sell the property at any time to the highest bidder, and if any loss be occasioned thereby, the officer may recover the amount of such loss, with costs, from the bidder so refusing, in any court of competent jurisdiction, and the person refusing to pay the costs which have accrued by reason of his bid shall be deemed guilty of contempt of court and punished accordingly.

History: En. Sec. 202, p. 85, Bannack Stat.; amd. Sec. 224, p. 181, L. 1867; re-en. Sec. 274, p. 86, Cod. Stat. 1871; amd. Sec. 324, p. 127, L. 1877; re-en. Sec. 324, 1st Div. Rev. Stat. 1879; re-en. Sec. 335, 1st Div. Comp. Stat. 1887; en. Sec. 1228, C. Civ. Proc. 1895; re-en. Sec. 6831, Rev. C. 1907; re-en. Sec. 9436, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 695; re-en. Sec. 9436, R.C.M. 1935; R.C.M. 1947, 93-5828.

25-13-706. Rejection of subsequent bids after refusal to pay. When a purchaser refuses to pay, the officer may, in his discretion, thereafter reject any subsequent bid of such purchaser.

History: En. Sec. 325, p. 128, L. 1877; re-en. Sec. 325, 1st Div. Rev. Stat. 1879; re-en. Sec. 336, 1st Div. Comp. Stat. 1887; re-en. Sec. 1229, C. Civ. Proc. 1895; re-en. Sec. 6832, Rev. C. 1907; re-en. Sec. 9437, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 696; re-en. Sec. 9437, R.C.M. 1935; R.C.M. 1947, 93-5829.

25-13-707. Liability of officer after resale. Sections 25-13-705 and 25-13-706 must not be construed to make the officer liable for any more than the amount bid by the second or subsequent purchaser and the amount collected from the purchaser refusing to pay.

History: En. Sec. 326, p. 128, L. 1877; re-en. Sec. 326, 1st Div. Rev. Stat. 1879; re-en. Sec. 337, 1st Div. Comp. Stat. 1887; re-en. Sec. 1230, C. Civ. Proc. 1895; re-en. Sec. 6833, Rev. C. 1907; re-en. Sec. 9438, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 697; re-en. Sec. 9438, R.C.M. 1935; R.C.M. 1947, 93-5830.

25-13-708. Conveyance of personal property capable of manual delivery. When the purchaser of any personal property capable of manual delivery pays the purchase money, the officer making the sale must deliver to the purchaser the property and, if desired, execute and deliver to him a certificate of the sale. Such certificate conveys to the purchaser all the right hich the debtor had in such property on the day the execution or attach- ent was levied.

History: En. Sec. 205, p. 85, Bannack Stat.; re-en. Sec. 227, p. 181, L. 1867; re-en. Sec. 277, p. , Cod. Stat. 1871; re-en. Sec. 327, p. 128, L. 1877; re-en. Sec. 327, 1st Div. Rev. Stat. 1879; re-en. c. 338, 1st Div. Comp. Stat. 1887; amd. Sec. 1231, C. Civ. Proc. 1895; re-en. Sec. 6834, Rev. C. 07; re-en. Sec. 9439, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 698; re-en. Sec. 9439, R.C.M. 1935; C.M. 1947, 93-5831.

25-13-709. Conveyance of personal property not capable of anual delivery. When the purchaser of any personal property not capa- e of manual delivery pays the purchase money, the officer making the sale ust execute and deliver to the purchaser a certificate of sale. Such certifi- te conveys to the purchaser all the right which the debtor had in such roperty on the day the execution or attachment was levied.

History: En. Sec. 228, p. 181, L. 1867; re-en. Sec. 278, p. 87, Cod. Stat. 1871; re-en. Sec. 328, 128, L. 1877; re-en. Sec. 328, 1st Div. Rev. Stat. 1879; re-en. Sec. 339, 1st Div. Comp. Stat. 1887; d. Sec. 1232, C. Civ. Proc. 1895; re-en. Sec. 6835, Rev. C. 1907; re-en. Sec. 9440, R.C.M. 1921; l. C. Civ. Proc. Sec. 699; re-en. Sec. 9440, R.C.M. 1935; R.C.M. 1947, 93-5832.

25-13-710. Real property — what interest transferred. Upon a le of real property, the purchaser is substituted to and acquires the right, tle, interest, and claim of the judgment debtor thereto; and when the estate less than a leasehold of 2 years' unexpired term, the sale is absolute. In l other cases, the property is subject to redemption, as provided in part 8 this chapter.

History: En. Sec. 229, p. 181, L. 1867; re-en. Sec. 279, p. 87, Cod. Stat. 1871; re-en. Sec. 329, 128, L. 1877; re-en. Sec. 329, 1st Div. Rev. Stat. 1879; re-en. Sec. 340, 1st Div. Comp. Stat. 1887; -en. Sec. 1233, C. Civ. Proc. 1895; re-en. Sec. 6836, Rev. C. 1907; re-en. Sec. 9441, R.C.M. 1921; l. C. Civ. Proc. Sec. 700; re-en. Sec. 9441, R.C.M. 1935; R.C.M. 1947, 93-5833(part).

25-13-711. Real property — certificate of sale. (1) Upon a sale of al property, the officer must give to the purchaser a certificate of sale, con- ining:

(a) a particular description of the property sold;

(b) the price bid for each distinct lot or parcel;

(c) the whole price paid;

(d) when subject to redemption, a statement to that effect.

(2) A duplicate of such certificate must be filed by the officer in the ffice of the county clerk.

History: En. Sec. 229, p. 181, L. 1867; re-en. Sec. 279, p. 87, Cod. Stat. 1871; re-en. Sec. 329, 128, L. 1877; re-en. Sec. 329, 1st Div. Rev. Stat. 1879; re-en. Sec. 340, 1st Div. Comp. Stat. 1887; -en. Sec. 1233, C. Civ. Proc. 1895; re-en. Sec. 6836, Rev. C. 1907; re-en. Sec. 9441, R.C.M. 1921; l. C. Civ. Proc. Sec. 700; re-en. Sec. 9441, R.C.M. 1935; R.C.M. 1947, 93-5833(part).

25-13-712. Property subject to a security interest — disposi- on of proceeds, security agreement. (1) When the property taken nder 25-13-505 is sold under process, the officer levying the writ must apply e proceeds of the sale as follows:

(a) to the repayment of the sum paid to the secured party, with interest om the date of such payment; and

(b) the balance, if any, in like manner as the proceeds of sales under ecution are applied in other cases.

(2) In the event the property is sold under execution, such creditor shall e required to deliver to the debtor the security agreement and any note or

other evidence of indebtedness secured thereby obtained from the secured party when the property is sold for the amount of the indebtedness unde the security agreement or an amount in excess thereof.

History: En. Sec. 1, Ch. 111, L. 1921; re-en. Sec. 9291, R.C.M. 1921; re-en. Sec. 9291, R.C.M 1935; amd. Sec. 11-162, Ch. 264, L. 1963; R.C.M. 1947, 93-4338(part).

25-13-713. Procedure when sale invalidated, revival of judgment. (1) If the purchaser of real property sold on execution or his successor in interest be evicted therefrom in consequence of irregularities in the proceedings concerning the sale or of the reversal or discharge of the judgment he may recover the price paid, with interest, from the judgment creditor.

(2) If the purchaser of property at sheriff's sale or his successor in interest fail to recover possession in consequence of irregularity in the proceedings concerning the sale or because the property sold was not subject to execution and sale, the court having jurisdiction thereof shall, on petition of such party in interest or his attorney, revive the original judgment for the amount paid by such purchaser at the sale, with interest thereon from the time of payment at the same rate that the original judgment bore. When so revived, the said judgment shall have the same effect as an original judgment of the said court of that date, bearing interest as aforesaid; and any other or after-acquired property, rents, issues, or profits of the said debtor shall be liable to levy and sale under execution in satisfaction of such debt, but no property of such debtor sold bona fide before the filing of such petition shall be subject to the lien of said judgment. The notice of the filing of such petition shall be made by filing a notice thereof in the office of the county clerk where such property may be situated, and said judgment shall be revived in the name of the original plaintiff or plaintiffs for the use of said petitioner, the party in interest.

History: En. Sec. 237, p. 183, L. 1867; re-en. Sec. 286, p. 89, Cod. Stat. 1871; re-en. Sec. 336, p. 132, L. 1877; re-en. Sec. 336, 1st Div. Rev. Stat. 1879; re-en. Sec. 347, 1st Div. Comp. Stat. 1887, re-en. Sec. 1241, C. Civ. Proc. 1895; re-en. Sec. 6844, Rev. C. 1907; re-en. Sec. 9450, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 708; re-en. Sec. 9450, R.C.M. 1935; R.C.M. 1947, 93-5842.

25-13-714. Validation of defective judicial sales. All judicial sales of real property prior to January 1, 1973, provided no action is pending on July 1, 1973, to set such sale aside, where made in this state on proceedings to satisfy valid judgments or decrees of any court and the moneys bidden thereon paid to the officer making such sale, shall be valid and sufficient in law to sustain a sheriff's deed based on such sale and, when no such deed has been executed, shall entitle such purchaser to such deed; and such deed, if now or when executed, shall be sufficient to convey all the title of the judgment debtor at the time of such sale in the premises so sold to the purchaser at said sale, and all defects or irregularities in the issuance of execution, the manner of making or conducting the sale, or the recitals or references in such deed shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity.

History: En. Sec. 1, Ch. 80, L. 1973; R.C.M. 1947, 93-5846.

Part 8

Redemption of Real Property

25-13-801. Who may redeem. (1) Property sold subject to redemption, as provided by 25-13-710, or any part sold separately may be redeemed the manner hereinafter provided by the following persons or their successors in interest:

(a) the judgment debtor, the judgment debtor's spouse, or his successor interest in the whole or any part of the property and, if the judgment ebtor or successor be a corporation, a stockholder thereof;

(b) a creditor having a lien by judgment, mortgage, or attachment on the operty sold or on some share or part thereof subsequent to that on which e property is sold. If a corporation be such creditor, then any stockholder ereof may redeem.

(2) The persons mentioned in subsection (1)(b) of this section are, in this art, termed "redemptioners".

History: En. Sec. 230, p. 181, L. 1867; re-en. Sec. 280, p. 87, Cod. Stat. 1871; re-en. Sec. 330, 129, L. 1877; re-en. Sec. 330, 1st Div. Rev. Stat. 1879; re-en. Sec. 341, 1st Div. Comp. Stat. 1887; nd. Sec. 1234, C. Civ. Proc. 1895; re-en. Sec. 6837, Rev. C. 1907; amd. Sec. 1, Ch. 107, L. 1913; -en. Sec. 9442, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 701; amd. Sec. 1, Ch. 16, L. 1927; re-en. Sec. 42, R.C.M. 1935; amd. Sec. 55, Ch. 535, L. 1975; R.C.M. 1947, 93-5834.

25-13-802. Time for redemption — amount to be paid. The judg- ent debtor or redemptioner may redeem the property from the purchaser ny time within 1 year after the sale on paying the purchaser:

(1) the amount of his purchase with ½ of 1% per month thereon in addi- on, up to the time of redemption;

(2) the amount of any assessment or taxes which the purchaser may have aid thereon after purchase and interest on such amount; and

(3) if the purchaser be also a creditor having a prior lien to that of the edemptioner other than the judgment under which such purchase was made, e amount of such lien with interest.

History: En. Sec. 231, p. 181, L. 1867; re-en. Sec. 281, p. 88, Cod. Stat. 1871; amd. Sec. 331, p. 9, L. 1877; re-en. Sec. 331, 1st Div. Rev. Stat. 1879; re-en. Sec. 342, 1st Div. Comp. Stat. 1887; nd. Sec. 1235, C. Civ. Proc. 1895; re-en. Sec. 6838, Rev. C. 1907; re-en. Sec. 9443, R.C.M. 1921; l. C. Civ. Proc. Sec. 702; re-en. Sec. 9443, R.C.M. 1935; amd. Sec. 1, Ch. 103, L. 1937; R.C.M. 47, 93-5835.

25-13-803. Subsequent redemptions — when permitted, amount aid. (1) If property be so redeemed by a redemptioner, another edemptioner may, within 60 days after the last redemption, again redeem it om the last redemptioner on paying the sum on such last redemption with terest thereon at the rate of ½ of 1% per month in addition, the amount f any assessment or taxes which the last redemptioner may have paid ereon after the redemption by him with like interest on such amount, and e amount of any liens held by the said last redemptioner prior to his own, ith interest; but the judgment under which the property was so sold need ot be so paid as a lien. The property may be again, and as often as any edemptioner is so disposed, redeemed from any previous redemptioner, ithin 60 days after the last redemption, on paying the sum paid on the last revious redemption with interest thereon at the rate of ½ of 1% per month, e amount of any assessment or taxes which the last previous redemptioner aid after the redemption by him with like interest thereon, and the amount f any liens, other than the judgment under which the property was sold, eld by the last redemptioner previous to his own, with like interest.

(2) If the judgment debtor or the judgment debtor's spouse redeem, the judgment debtor or the spouse must make the same payments as are required to effect a redemption by a redemptioner.

History: En. Sec. 232, p. 182, L. 1867; re-en. Sec. 282, p. 88, Cod. Stat. 1871; amd. Sec. 332, p 129, L. 1877; re-en. Sec. 332, 1st Div. Rev. Stat. 1879; re-en. Sec. 343, 1st Div. Comp. Stat. 1887 amd. Sec. 1236, C. Civ. Proc. 1895; re-en. Sec. 6839, Rev. C. 1907; en. Sec. 2, Ch. 107, L. 1913; re-en Sec. 9444, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 703; amd. Sec. 2, Ch. 16, L. 1927; re-en. Sec. 9444, R.C.M. 1935; amd. Sec. 2, Ch. 103, L. 1937; amd. Sec. 56, Ch. 535, L. 1975; R.C.M. 1947, 93-5836(part).

25-13-804. Redemption by stockholder or corporation. (1) If a stockholder of a corporation redeems, the corporation, within 1 year after the date of sale, may redeem by paying to the redemptioner or the sheriff for his benefit the amount paid to effect the redemption, with interest thereon at the rate of ½ of 1% per month from the date of redemption until the date of such payment, together with any taxes or assessments that may have been paid by the redemptioner, with like interest thereon.

(2) When a stockholder redeems, any other stockholder or stockholders may, at any time after such redemption and within 60 days after the expiration of 1 year from the date of sale, contribute to the redemption by paying to the redeeming stockholder or depositing with the sheriff for his benefit a sum which bears the same proportion to the amount necessary to redeem which the number of shares owned by such contributing stockholder or stockholders bears to the number of shares of such corporation outstanding, with interest on such sum from the date of redemption until the date of contribution at the rate of ½ of 1% per month, together with a like proportion of the taxes or assessments paid by such redeeming stockholder, with like interest thereon; and if the corporation does not redeem the property within the time and in the manner and form as aforesaid, the said redeeming and contributing stockholders shall be entitled to receive a sheriff's deed for such property so redeemed and shall succeed to the said property as tenants in common in such proportions, respectively, as they shall respectively pay or contribute to such redemption as aforesaid. The redeeming or contributing stockholder shall, in all cases when applying to redeem or contribute as aforesaid, present an affidavit setting forth the number of shares of stock owned by him and, to the best of his knowledge, the number of shares of stock of the corporation outstanding.

History: En. Sec. 232, p. 182, L. 1867; re-en. Sec. 282, p. 88, Cod. Stat. 1871; amd. Sec. 332, p. 129, L. 1877; re-en. Sec. 332, 1st Div. Rev. Stat. 1879; re-en. Sec. 343, 1st Div. Comp. Stat. 1887; amd. Sec. 1236, C. Civ. Proc. 1895; re-en. Sec. 6839, Rev. C. 1907; en. Sec. 2, Ch. 107, L. 1913; re-en. Sec. 9444, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 703; amd. Sec. 2, Ch. 16, L. 1927; re-en. Sec. 9444, R.C.M. 1935; amd. Sec. 2, Ch. 103, L. 1937; amd. Sec. 56, Ch. 535, L. 1975; R.C.M. 1947, 93-5836(3).

25-13-805. Redemption by debtor from spouse. If the spouse of a judgment debtor redeem, the judgment debtor, within 1 year after the date of sale, may redeem by paying the spouse or the spouse's successors in interest or the sheriff for the benefit of the spouse or the successors in interest of the spouse the amount paid to effect the redemption, with interest thereon at the rate of ½ of 1% per month from the date of redemption until the date of such payment, together with any taxes or assessments that may have been paid by the spouse or the successors in interest of the spouse, with like interest thereon.

History: En. Sec. 232, p. 182, L. 1867; re-en. Sec. 282, p. 88, Cod. Stat. 1871; amd. Sec. 332, p. 129, L. 1877; re-en. Sec. 332, 1st Div. Rev. Stat. 1879; re-en. Sec. 343, 1st Div. Comp. Stat. 1887;

amd. Sec. 1236, C. Civ. Proc. 1895; re-en. Sec. 6839, Rev. C. 1907; en. Sec. 2, Ch. 107, L. 1913; re-en. Sec. 9444, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 703; amd. Sec. 2, Ch. 16, L. 1927; re-en. Sec. 9444, R.C.M. 1935; amd. Sec. 2, Ch. 103, L. 1937; amd. Sec. 56, Ch. 535, L. 1975; R.C.M. 1947, 93-5836(4).

25-13-806. Notice of redemption, liens, and taxes and assessments paid. Written notice of redemption must be given to the sheriff and a duplicate filed with the county clerk, and if any taxes or assessments are paid by the redemptioner or if he has or acquired any liens other than that upon which the redemption was made, notice thereof must in like manner be given to the sheriff and filed with the county clerk, and if such notice be not filed, the property may be redeemed without paying such tax, assessments, or lien.

History: En. Sec. 232, p. 182, L. 1867; re-en. Sec. 282, p. 88, Cod. Stat. 1871; amd. Sec. 332, p. 129, L. 1877; re-en. Sec. 332, 1st Div. Rev. Stat. 1879; re-en. Sec. 343, 1st Div. Comp. Stat. 1887; amd. Sec. 1236, C. Civ. Proc. 1895; re-en. Sec. 6839, Rev. C. 1907; en. Sec. 2, Ch. 107, L. 1913; re-en. Sec. 9444, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 703; amd. Sec. 2, Ch. 16, L. 1927; re-en. Sec. 9444, R.C.M. 1935; amd. Sec. 2, Ch. 103, L. 1937; amd. Sec. 56, Ch. 535, L. 1975; R.C.M. 1947, 93-5836(part).

25-13-807. Papers redemptioner must produce. A redemptioner must produce, to the officer or person from whom he seeks to redeem, and serve with his notice to the sheriff:

(1) a copy of the docket of the judgment under which he claims the right to redeem, certified by the clerk of the court or by the clerk of the district court in the county where the judgment is docketed; or if he redeem upon a mortgage or other lien, a note of the record thereof, certified by the county clerk; or if upon an attachment, a copy of the affidavit of attachment, certified by the clerk of the district court;

(2) a copy of any assignment necessary to establish his claim, verified by the affidavit of himself or of a subscribing witness thereto;

(3) an affidavit by himself or his agent showing the amount then actually due upon the lien.

History: En. Sec. 234, p. 182, L. 1867; re-en. Sec. 284, p. 88, Cod. Stat. 1871; re-en. Sec. 334, p. 131, L. 1877; re-en. Sec. 334, 1st Div. Rev. Stat. 1879; re-en. Sec. 345, 1st Div. Comp. Stat. 1887; amd. Sec. 1238, C. Civ. Proc. 1895; re-en. Sec. 6841, Rev. C. 1907; re-en. Sec. 9446, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 705; re-en. Sec. 9446, R.C.M. 1935; R.C.M. 1947, 93-5838.

25-13-808. To whom redemption money paid. The payment mentioned in 25-13-802 through 25-13-806 may be made to the purchaser or redemptioner, as the case may be, or for him to the officer who made the sale or, in case his term of office has expired, to his successor in office.

History: En. Sec. 233, p. 182, L. 1867; en. Sec. 283, p. 88, Cod. Stat. 1871; re-en. Sec. 333, p. 129, L. 1877; re-en. Sec. 333, 1st Div. Rev. Stat. 1879; re-en. Sec. 344, 1st Div. Comp. Stat. 1887; re-en. Sec. 1237, C. Civ. Proc. 1895; re-en. Sec. 6840, Rev. C. 1907; re-en. Sec. 9445, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 704; re-en. Sec. 9445, R.C.M. 1935; R.C.M. 1947, 93-5837(part).

25-13-809. Effect of redemption by debtor or debtor's spouse — certificate of redemption. (1) If the debtor redeem, the effect of the sale is terminated and the debtor is restored to his own estate. If the spouse redeem, such spouse shall become the owner of the debtor spouse's interest, subject to any liens thereon at the time of the execution sale.

(2) Upon a redemption by a debtor or the debtor's spouse, the person to whom the payment was made must execute and deliver to him or her a certificate of redemption, acknowledged or proved before an officer authorized

to take acknowledgments of conveyances of real property. Such certificate must be filed and recorded in the office of the county clerk of the county in which the property is situated, and the county clerk must note the record thereof in the margin of the record of the certificate of sale.

History: En. Sec. 232, p. 182, L. 1867; re-en. Sec. 282, p. 88, Cod. Stat. 1871; amd. Sec. 332, p. 129, L. 1877; re-en. Sec. 332, 1st Div. Rev. Stat. 1879; re-en. Sec. 343, 1st Div. Comp. Stat. 1887; amd. Sec. 1236, C. Civ. Proc. 1895; re-en. Sec. 6839, Rev. C. 1907; en. Sec. 2, Ch. 107, L. 1913; re-en. Sec. 9444, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 703; amd. Sec. 2, Ch. 16, L. 1927; re-en. Sec. 9444, R.C.M. 1935; amd. Sec. 2, Ch. 103, L. 1937; amd. Sec. 56, Ch. 535, L. 1975; R.C.M. 1947, 93-5836(part).

25-13-810. When purchaser entitled to conveyance. If no redemption be made within 1 year after the sale, the purchaser or his assignee is entitled to a conveyance; or if so redeemed, whenever 60 days have elapsed and no other redemption has been made and notice thereof given and the time for redemption has expired, the last redemptioner or his assignee is entitled to a sheriff's deed; but in all cases, the judgment debtor shall have the entire period of 1 year from the date of the sale to redeem the property.

History: En. Sec. 232, p. 182, L. 1867; re-en. Sec. 282, p. 88, Cod. Stat. 1871; amd. Sec. 332, p. 129, L. 1877; re-en. Sec. 332, 1st Div. Rev. Stat. 1879; re-en. Sec. 343, 1st Div. Comp. Stat. 1887; amd. Sec. 1236, C. Civ. Proc. 1895; re-en. Sec. 6839, Rev. C. 1907; en. Sec. 2, Ch. 107, L. 1913; re-en. Sec. 9444, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 703; amd. Sec. 2, Ch. 16, L. 1927; re-en. Sec. 9444, R.C.M. 1935; amd. Sec. 2, Ch. 103, L. 1937; amd. Sec. 56, Ch. 535, L. 1975; R.C.M. 1947, 93-5836(part).

25-13-811. Who to execute conveyance. In all cases when, under the provisions of this chapter, a purchaser of property at execution sale shall be entitled to a conveyance of the same, such conveyance shall be executed to him by the officer who made the sale if he still be in office, but in the case the officer who made such sale is not in office at the time the purchaser may be entitled to such conveyance, then the conveyance shall be executed by his successor in office.

History: En. Sec. 233, p. 182, L. 1867; en. Sec. 283, p. 88, Cod. Stat. 1871; re-en. Sec. 333, p. 129, L. 1877; re-en. Sec. 333, 1st Div. Rev. Stat. 1879; re-en. Sec. 344, 1st Div. Comp. Stat. 1887; re-en. Sec. 1237, C. Civ. Proc. 1895; re-en. Sec. 6840, Rev. C. 1907; re-en. Sec. 9445, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 704; re-en. Sec. 9445, R.C.M. 1935; R.C.M. 1947, 93-5837(part).

25-13-812 through 25-13-820 reserved.

25-13-821. Possession of lands during redemption period. The purchaser of lands at execution sales is not entitled to the possession thereof as against the execution debtor during the period of redemption allowed by law while said execution debtor personally occupies the land as a home for himself and his family. The intention hereof being to insure to such debtor the possession of his land during the year of redemption.

History: En. Sec. 1, Ch. 230, L. 1921; re-en. Sec. 9449, R.C.M. 1921; amd. Sec. 1, Ch. 150, L. 1933; re-en. Sec. 9449, R.C.M. 1935; R.C.M. 1947, 93-5841(part).

25-13-822. Rents and profits during redemption period, accounting. (1) The purchaser, from the time of the sale until a redemption, and a redemptioner, from the time of his redemption until another redemption, are entitled to receive from the tenant in possession the rents of the property sold or the value of the use and occupation thereof. But when any rents or profits have been received by the judgment creditor or purchaser or his or their assigns from the property thus sold preceding such redemption, the amount of such rents and profits shall be a credit upon the redemption money to be paid.

(2) If the redemptioner or judgment debtor, before the expiration of the time allowed for such redemption, demands in writing of such purchaser or creditor or his assigns a written and verified statement of the amount of such rents and profits thus received, the period for redemption is extended 5 days after such sworn statement is given by such purchaser or his assigns to such redemptioner or debtor. If such purchaser or his assigns shall, for a period of 1 month from and after such demand, fail or refuse to give such statement, such redemptioner or debtor may bring an action in any court of competent jurisdiction to compel an accounting and disclosure of such rents and profits, and until 15 days from and after the final determination of such action, the right of redemption is extended to such redemptioner or debtor.

History: En. Sec. 236, p. 183, L. 1867; rep. Sec. 751, p. 187, Cod. Stat. 1871; en. Sec. 1240, C. Civ. Proc. 1895; re-en. Sec. 6843, Rev. C. 1907; re-en. Sec. 9448, R.C.M. 1921; Cal. C. Civ. Proc. 707; re-en. Sec. 9448, R.C.M. 1935; R.C.M. 1947, 93-5840.

25-13-823. Restraint of waste during redemption period. Until the expiration of the time allowed for redemption, the court may restrain the commission of waste on the property, by order granted with or without notice, on the application of the purchaser or the judgment creditor. But it is not waste for the person in possession of the property at the time of sale or entitled to possession afterward, during the period allowed for redemption, to continue to use it in the same manner in which it was previously used, to use it in the ordinary course of husbandry, to make the necessary repairs of buildings thereon, or to use wood or timber on the property therefor or for the repair of fences or for fuel for his family while he occupies the property.

History: En. Sec. 235, p. 182, L. 1867; re-en. Sec. 285, p. 89, Cod. Stat. 1871; re-en. Sec. 335, p. 131, L. 1877; re-en. Sec. 335, 1st Div. Rev. Stat. 1879; re-en. Sec. 346, 1st Div. Comp. Stat. 1887; re-en. Sec. 1239, C. Civ. Proc. 1895; re-en. Sec. 6842, Rev. C. 1907; re-en. Sec. 9447, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 706; re-en. Sec. 9447, R.C.M. 1935; R.C.M. 1947, 93-5839.

25-13-824. Enjoining injury to property after sale and before conveyance. The court or judge may, by injunction, upon good cause shown, restrain the party in possession from doing any act to the injury of real property after a sale on execution, before a conveyance.

History: En. Sec. 240, p. 93, Bannack Stat.; re-en. Sec. 261, p. 188, L. 1867; re-en. Sec. 310, p. 95, Cod. Stat. 1871; re-en. Sec. 360, p. 139, L. 1877; re-en. Sec. 360, 1st Div. Rev. Stat. 1879; re-en. Sec. 372, 1st Div. Comp. Stat. 1887; re-en. Sec. 1318, C. Civ. Proc. 1895; re-en. Sec. 6878, Rev. C. 1907; re-en. Sec. 9496, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 745; re-en. Sec. 9496, R.C.M. 1935; R.C.M. 1947, 93-6220(part).

25-13-825. Damages for injury to property after sale and before conveyance. When real property has been sold on execution, the purchaser thereof or any person who may have succeeded to his interest may, after his estate becomes absolute, recover damages for injury to the property by the tenant in possession after sale and before possession is delivered under the conveyance.

History: En. Sec. 262, p. 188, L. 1867; re-en. Sec. 311, p. 95, L. 1871; re-en. Sec. 361, p. 139, L. 1877; re-en. Sec. 361, 1st Div. Rev. Stat. 1879; re-en. Sec. 373, 1st Div. Comp. Stat. 1887; re-en.

Sec. 1319, C. Civ. Proc. 1895; re-en. Sec. 6879, Rev. C. 1907; re-en. Sec. 9497, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 746; re-en. Sec. 9497, R.C.M. 1935; R.C.M. 1947, 93-6221.

CHAPTER 14

PROCEEDINGS IN AID OF EXECUTION

Part 1 — Proceedings to Determine Availability of Property

Section

25-14-101. Debtor to answer concerning his property when execution unsatisfied.
25-14-102. Procedure when debtor withholding property from execution, arrest.
25-14-103. Debtors of judgment debtor and those holding his property to answer.
25-14-104. Procedure when debt to or ownership of judgment debtor denied.
25-14-105. Requiring witnesses to testify.
25-14-106. Immunity of witnesses to criminal proceedings.
25-14-107. Order to apply property to satisfaction of judgment.
25-14-108. Contempt to disobey referee's orders.

Part 2 — Appointment of a Receiver

25-14-201. Appointment of a receiver — notice.
25-14-202. Order appointing receiver to be filed.
25-14-203. Oath and undertaking.
25-14-204. When property vests in receiver.
25-14-205. Relation back of receiver's title.

Part 3 — Discharge of Imprisoned Judgment Debtor

25-14-301. Persons imprisoned to be discharged.
25-14-302. Notice of application for discharge.
25-14-303. Service of notice.
25-14-304. Hearing on application.
25-14-305. Interrogatories directed to prisoner by plaintiff.
25-14-306. Prisoner to take oath.
25-14-307. Order of discharge.
25-14-308. Reapplication for discharge.
25-14-309. Effect of discharge.
25-14-310. Judgment unaffected.
25-14-311. Discharge at instance of plaintiff.
25-14-312. Discharge upon failure of plaintiff to advance money for support of prisoner.

Part 1

Proceedings to Determine Availability of Property

25-14-101. Debtor to answer concerning his property when execution unsatisfied. When an execution against property of the judgment debtor or of any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or, if he does not reside in this state, to the sheriff of the county where the judgment roll is filed, is returned unsatisfied in whole or in part, the judgment creditor, at any time after such return is made, is entitled to an order from a judge of the court requiring such judgment debtor to appear and answer concerning his property before such judge or a referee appointed by him at a time and place specified in the order; but no judgment debtor must be required to attend before a judge or referee out of the county in which he resides.

History: En. Sec. 215, p. 88, Bannack Stat.; re-en. Sec. 238, p. 184, L. 1867; re-en. Sec. 287, p. 0, Cod. Stat. 1871; re-en. Sec. 338, p. 133, L. 1877; re-en. Sec. 338, 1st Div. Rev. Stat. 1879; re-en. Sec. 350, 1st Div. Comp. Stat. 1887; re-en. Sec. 1260, C. Civ. Proc. 1895; re-en. Sec. 6848, Rev. C. 907; re-en. Sec. 9454, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 714; re-en. Sec. 9454, R.C.M. 1935; R.C.M. 1947, 93-5901.

25-14-102. Procedure when debtor withholding property from execution, arrest. (1) After the issuing of an execution against property and upon proof, by affidavit of a party or otherwise, to the satisfaction of a judge of the court that any judgment debtor has property which he unjustly refuses to apply toward the satisfaction of the judgment, such judge may, by an order, require the judgment debtor to appear at a specified time and place before such judge or a referee appointed by him to answer concerning the same; and such proceedings may thereupon be had for the application of the property of the judgment debtor toward the satisfaction of the judgment as are provided upon the return of an execution.

(2) Instead of the order requiring the attendance of the judgment debtor, the judge may, upon affidavit of the judgment creditor or his agent or attorney, if it appear to him that there is danger of the debtor absconding, order the sheriff to arrest the debtor and bring him before such judge. Upon being brought before the judge, he may be ordered to enter into an undertaking with sufficient surety that he will attend from time to time before the judge or referee, as may be directed during the pendency of proceedings and until the final determination thereof, and will not in the meantime dispose of any portion of his property not exempt from execution. In default of entering into such undertaking, he may be committed to prison.

History: En. Sec. 216, p. 88, Bannack Stat.; en. Sec. 239, p. 184, L. 1867; re-en. Sec. 288, p. 90, Cod. Stat. 1871; re-en. Sec. 339, p. 133, L. 1877; re-en. Sec. 339, 1st Div. Rev. Stat. 1879; re-en. Sec. 51, 1st Div. Comp. Stat. 1887; re-en. Sec. 1261, C. Civ. Proc. 1895; re-en. Sec. 6849, Rev. C. 1907; re-en. Sec. 9455, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 715; re-en. Sec. 9455, R.C.M. 1935; R.C.M. 947, 93-5902.

25-14-103. Debtors of judgment debtor and those holding his property to answer. After the issuing or return of an execution against property of the judgment debtor or of any one of several debtors in the same judgment, or upon proof, by affidavit or otherwise, to the satisfaction of the judge that any person or corporation has property of such judgment debtor or is indebted to him in an amount exceeding $50, the judge may, by an order, require such person or corporation or any officer or member thereof to appear at a specified time and place before him or a referee appointed by him and answer concerning the same.

History: En. Sec. 218, p. 88, Bannack Stat.; re-en. Sec. 241, p. 184, L. 1867; re-en. Sec. 290, Cod. Stat. 1871; re-en. Sec. 341, p. 134, L. 1877; re-en. Sec. 341, 1st Div. Rev. Stat. 1879; re-en. Sec. 353, 1st Div. Comp. Stat. 1887; re-en. Sec. 1263, C. Civ. Proc. 1895; re-en. Sec. 6851, Rev. C. 1907; re-en. Sec. 9457, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 717; re-en. Sec. 9457, R.C.M. 1935; R.C.M. 1947, 3-5904.

25-14-104. Procedure when debt to or ownership of judgment debtor denied. If it appear that a person or corporation alleged to have property of the judgment debtor or to be indebted to him claims an interest in the property adverse to him or denies the debt, the court or judge may authorize, by an order made to that effect, the judgment creditor to institute an action against such person or corporation for the recovery of such interest or debt; and the court or judge may, by order, forbid a transfer or other disposition of such interest or debt until an action can be commenced and prosecuted to judgment. Such order may be modified or vacated by the judge granting the same or the court in which the action is brought, at any time, upon such terms as may be just.

History: En. Sec. 221, p. 89, Bannack Stat.; re-en. Sec. 244, p. 185, L. 1867; re-en. Sec. 293, Cod. Stat. 1871; re-en. Sec. 344, p. 135, L. 1877; re-en. Sec. 344, 1st Div. Rev. Stat. 1879; re-en. Sec. 356, 1st Div. Comp. Stat. 1887; re-en. Sec. 1266, C. Civ. Proc. 1895; re-en. Sec. 6854, Rev. C. 1907; re-en. Sec. 9460, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 720; re-en. Sec. 9460, R.C.M. 1935; R.C.M. 1947, 93-5907.

25-14-105. Requiring witnesses to testify. Witnesses may be required to appear and testify before the judge or referee, upon any proceeding under parts 1 and 2 of this chapter, in the same manner as upon the trial of an issue.

History: En. Sec. 219, p. 88, Bannack Stat.; re-en. Sec. 242, p. 185, L. 1867; re-en. Sec. 291, Cod. Stat. 1871; re-en. Sec. 342, p. 134, L. 1877; re-en. Sec. 342, 1st Div. Rev. Stat. 1879; re-en. Sec. 354, 1st Div. Comp. Stat. 1887; re-en. Sec. 1264, C. Civ. Proc. 1895; re-en. Sec. 6852, Rev. C. 1907; re-en. Sec. 9458, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 718; re-en. Sec. 9458, R.C.M. 1935; R.C.M. 1947, 93-5905.

25-14-106. Immunity of witnesses to criminal proceedings. A party or witness examined in proceedings authorized by parts 1 and 2 of this chapter is not excused from answering a question on the ground that his examination will tend to convict him of the commission of a fraud or to prove that he has been a party or privy to or knowing of a conveyance, assignment, transfer, or other disposition of property for any purpose or that he or any other person claims to be entitled, as against the judgment creditor or a receiver appointed or to be appointed in the proceedings, to hold property derived from or through the judgment debtor or to be discharged from the payment of a debt which was due to the judgment debtor or to a person in his behalf. But an answer cannot be used as evidence against the person so answering in a criminal action or criminal proceeding.

History: En. Sec. 1268, C. Civ. Proc. 1895; re-en. Sec. 6856, Rev. C. 1907; re-en. Sec. 9462, R.C.M. 1921; re-en. Sec. 9462, R.C.M. 1935; R.C.M. 1947, 93-5909.

25-14-107. Order to apply property to satisfaction of judgment. The judge or referee may order any property of a judgment debtor, not exempt from execution, in the hands of such debtor or any other person or due to the judgment debtor, to be applied toward the satisfaction of the judgment.

History: En. Sec. 220, p. 89, Bannack Stat.; re-en. Sec. 243, p. 185, L. 1867; re-en. Sec. 292, Cod. Stat. 1871; re-en. Sec. 343, p. 135, L. 1877; re-en. Sec. 343, 1st Div. Rev. Stat. 1879; re-en. Sec. 355, 1st Div. Comp. Stat. 1887; re-en Sec. 1265, C. Civ. Proc. 1895; re-en. Sec. 6853, Rev. C. 1907; re-en. Sec. 9459, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 719; re-en. Sec. 9459, R.C.M. 1935; R.C.M. 1947, 93-5906.

25-14-108. Contempt to disobey referee's orders. If any person, party, or witness disobey an order of the referee, properly made in the proceedings before him under parts 1 and 2 of this chapter, he may be punished by the court or judge ordering the reference for a contempt.

History: En. Sec. 222, p. 89, Bannack Stat.; re-en. Sec. 245, p. 185, L. 1867; re-en. Sec. 294, Cod. Stat. 1871; re-en. Sec. 345, p. 135, L. 1877; re-en. Sec. 345, 1st Div. Rev. Stat. 1879; re-en. Sec. 357, 1st Div. Comp. Stat. 1887; re-en. Sec. 1267, C. Civ. Proc. 1895; re-en. Sec. 6855, Rev. C. 1907; re-en. Sec. 9461, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 721; re-en. Sec. 9461, R.C.M. 1935; R.C.M. 1947, 93-5908.

Part 2

Appointment of a Receiver

25-14-201. Appointment of a receiver — notice. At any time after making an order requiring the judgment debtor or any other person to attend and be examined, as prescribed in parts 1 and 2 of this chapter, the judge may make an order appointing a receiver of the property of the judgment debtor. At least 2 days' notice of the application for the order appointing a receiver must be given personally to the judgment debtor unless the judge is satisfied that he cannot, with reasonable diligence, be found within the state, n which case the order must recite that fact and may dispense with notice or direct notice to be given in any manner which the judge thinks proper. But where the order to attend and be examined has been served upon the udgment debtor, a receiver may be appointed upon the return day thereof or at the close of the examination without further notice to him.

History: En. Sec. 1269, C. Civ. Proc. 1895; re-en. Sec. 6857, Rev. C. 1907; re-en. Sec. 9463, R.C.M. 1921; re-en. Sec. 9463, R.C.M. 1935; R.C.M. 1947, 93-5910.

25-14-202. Order appointing receiver to be filed. An order appointing a receiver must be filed in the office of the clerk of the court where the judgment roll is filed, or a transcript of the judgment.

History: En. Sec. 1270, C. Civ. Proc. 1895; re-en. Sec. 6858, Rev. C. 1907; re-en. Sec. 9464, R.C.M. 1921; re-en. Sec. 9464, R.C.M. 1935; R.C.M. 1947, 93-5911(part).

25-14-203. Oath and undertaking. The receiver must take and subscribe the official oath and give an undertaking, if required by the judge.

History: En. Sec. 1270, C. Civ. Proc. 1895; re-en. Sec. 6858, Rev. C. 1907; re-en. Sec. 9464, R.C.M. 1921; re-en. Sec. 9464, R.C.M. 1935; R.C.M. 1947, 93-5911(part).

25-14-204. When property vests in receiver. The property of the udgment debtor is vested in a receiver who has duly qualified from the time of filing the order appointing him, subject to the following exceptions:

(1) Real property is vested in the receiver only from the time when the order is filed with the clerk of the court or a certified copy thereof, as the case may be, is filed with the clerk of the county where it is situated.

(2) Where the judgment debtor, at the time when the order is filed, esides in another county of the state, his personal property is vested in the eceiver only from the time when a copy of the order, certified by the clerk n whose office it is filed, is filed with the clerk of the district court of the county where he resides.

History: En. Sec. 1271, C. Civ. Proc. 1895; re-en. Sec. 6859, Rev. C. 1907; re-en. Sec. 9465, R.C.M. 1921; re-en. Sec. 9465, R.C.M. 1935; R.C.M. 1947, 93-5912.

25-14-205. Relation back of receiver's title. (1) Where the eceiver's title to personal property has become vested, as prescribed in 25-14-204, it also extends back by relation for the benefit of the judgment creditor in whose behalf the proceedings were instituted, as follows:

(a) Where an order requiring the judgment debtor to attend and be examined has been served before the appointment of a receiver or the judgment debtor has been brought before the judge on arrest, the receiver's title extends back so as to include the personal property of the judgment debtor at the time of the service of the order or his arrest.

(b) Where an order has not been served or no arrest, as specified in subsection (1)(a), but an order has been made requiring a person to attend and be examined concerning property belonging or a debt due to the judgment debtor, the receiver's title extends to the personal property belonging to the judgment debtor which was in the hands or under the control of the person or corporation thus required to attend at the time of the service of the order and to a debt then due him from that person or corporation.

(c) In every other case, where notice of the application for the appointment of the receiver was given to the judgment debtor, the receiver's title extends to the personal property of the judgment debtor at the time when the notice was served, either personally or by complying with the requirements of an order prescribing a substitute for personal service.

(2) Where the case is within two or more of subsections (1)(a) through (1)(c) of this section, the rule most favorable to the judgment creditor must be adopted.

(3) But this section does not affect the title of a purchaser in good faith, without notice, and for a valuable consideration or the payment of a debt in good faith and without notice.

History: En. Sec. 1272, C. Civ. Proc. 1895; re-en. Sec. 6860, Rev. C. 1907; re-en. Sec. 9466, R.C.M. 1921; re-en. Sec. 9466, R.C.M. 1935; R.C.M. 1947, 93-5913.

Part 3

Discharge of Imprisoned Judgment Debtor

25-14-301. Persons imprisoned to be discharged. Any person confined in jail on an execution issued on a judgment rendered in a civil action must be discharged therefrom upon the conditions of this part specified.

History: En. Sec. 107, p. 48, Cod. Stat. 1871; re-en. Sec. 145, p. 74, L. 1877; re-en. Sec. 145, 1st Div. Rev. Stat. 1879; re-en. Sec. 147, 1st Div. Comp. Stat. 1887; re-en. Sec. 2060, C. Civ. Proc. 1895; re-en. Sec. 7257, Rev. C. 1907; re-en. Sec. 9875, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1143; re-en. Sec. 9875, R.C.M. 1935; R.C.M. 1947, 93-9601.

25-14-302. Notice of application for discharge. Such person must cause a notice in writing to be given to the plaintiff or his agent or attorney that at a certain time and place he will apply to a judge of the district court of the county in which such person may be confined for the purpose of obtaining a discharge from his imprisonment.

History: En. Sec. 108, p. 48, Cod. Stat. 1871; re-en. Sec. 146, p. 74, L. 1877; re-en. Sec. 146, 1st Div. Rev. Stat. 1879; re-en. Sec. 148, 1st Div. Comp. Stat. 1887; re-en. Sec. 2061, C. Civ. Proc. 1895; re-en. Sec. 7258, Rev. C. 1907; re-en. Sec. 9876, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1144; re-en. Sec. 9876, R.C.M. 1935; R.C.M. 1947, 93-9602.

25-14-303. Service of notice. Such notice must be served upon the plaintiff or his agent or attorney 1 day at least before the hearing of the pplication. If the plaintiff be not a resident of the county and have no agent attorney in the county, no such notice will be served.

History: En. Sec. 109, p. 48, Cod. Stat. 1871; re-en. Sec. 147, p. 74, L. 1877; re-en. Sec. 147, 1st v. Rev. Stat. 1879; re-en. Sec. 149, 1st Div. Comp. Stat. 1887; re-en. Sec. 2062, C. Civ. Proc. 1895; -en. Sec. 7259, Rev. C. 1907; re-en. Sec. 9877, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1145; re-en. c. 9877, R.C.M. 1935; R.C.M. 1947, 93-9603.

25-14-304. Hearing on application. At the time and place specified the notice, such person must be taken before the judge, who must examine im under oath concerning his estate and property and effects, the disposal ereof, and his ability to pay the judgment for which he is committed; and ch judge may also hear any other legal or pertinent evidence that may be roduced by the debtor or the creditor.

History: En. Sec. 110, p. 48, Cod. Stat. 1871; re-en. Sec. 148, p. 74, L. 1877; re-en. Sec. 148, 1st iv. Rev. Stat. 1879; re-en. Sec. 150, 1st Div. Comp. Stat. 1887; re-en. Sec. 2063, C. Civ. Proc. 1895; -en. Sec. 7260, Rev. C. 1907; re-en. Sec. 9878, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1146; re-en. c. 9878, R.C.M. 1935; R.C.M. 1947, 93-9604.

25-14-305. Interrogatories directed to prisoner by plaintiff. he plaintiff in the action may, upon such examination, propose to the pris- ner any such interrogatories pertinent to the inquiry; and they must, if quired by him, be proposed and answered in writing, and the answer must e signed and sworn to by the prisoner.

History: En. Sec. 2064, C. Civ. Proc. 1895; re-en. Sec. 7261, Rev. C. 1907; re-en. Sec. 9879, .C.M. 1921; Cal. C. Civ. Proc. Sec. 1147; re-en. Sec. 9879, R.C.M. 1935; R.C.M. 1947, 93-9605.

25-14-306. Prisoner to take oath. If, upon the examination, the dge is satisfied that the prisoner is entitled to his discharge, he must dminister to him the following oath: "I, ..., do solemnly swear that I have ot any estate, real or personal, to the amount of $50, except such as is by w exempted from being taken in execution; and that I have not any other state now conveyed or concealed or in any way disposed of with design to ecure the same to my use or to hinder, delay, or defraud my creditors; so elp me God."

History: En. Sec. 111, p. 48, Cod. Stat. 1871; re-en. Sec. 149, p. 74, L. 1877; re-en. Sec. 149, 1st iv. Rev. Stat. 1879; re-en. Sec. 151, 1st Div. Comp. Stat. 1887; re-en. Sec. 2065, C. Civ. Proc. 1895; -en. Sec. 7262, Rev. C. 1907; re-en. Sec. 9880, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1148; re-en. ec. 9880, R.C.M. 1935; R.C.M. 1947, 93-9606.

25-14-307. Order of discharge. After administering the oath, the dge must issue an order that the prisoner be discharged from custody, and he officer, upon the service of such order, must discharge the prisoner forthwith if he be imprisoned for no other cause.

History: En. Sec. 112, p. 48, Cod. Stat. 1871; re-en. Sec. 150, p. 74, L. 1877; re-en. Sec. 150, 1st iv. Rev. Stat. 1879; re-en. Sec. 152, 1st Div. Comp. Stat. 1887; re-en. Sec. 2066, C. Civ. Proc. 1895; -en. Sec. 7263, Rev. C. 1907; re-en. Sec. 9881, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1149; re-en. ec. 9881, R.C.M. 1935; R.C.M. 1947, 93-9607.

25-14-308. Reapplication for discharge. If such judge does not dis- harge the prisoner, he may apply for his discharge at the end of every suc- eeding 10 days in the same manner as above provided, and the same roceedings must thereupon be had.

History: En. Sec. 113, p. 48, Cod. Stat. 1871; re-en. Sec. 151, p. 74, L. 1877; re-en. Sec. 151, 1st iv. Rev. Stat. 1879; re-en. Sec. 153, 1st Div. Comp. Stat. 1887; re-en. Sec. 2067, C. Civ. Proc. 1895;

re-en. Sec. 7264, Rev. C. 1907; re-en. Sec. 9882, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1150; re-e Sec. 9882, R.C.M. 1935; R.C.M. 1947, 93-9608.

25-14-309. Effect of discharge. The prisoner, after being so discharged, is forever exempt from arrest or imprisonment for the same deb unless he be convicted of having willfully sworn falsely upon his examinatio before the judge or in taking the oath before prescribed.

History: En. Sec. 114, p. 48, Cod. Stat. 1871; re-en. Sec. 152, p. 74, L. 1877; re-en. Sec. 152, 1s Div. Rev. Stat. 1879; re-en. Sec. 154, 1st Div. Comp. Stat. 1887; re-en. Sec. 2068, C. Civ. Proc. 1895 re-en. Sec. 7265, Rev. C. 1907; re-en. Sec. 9883, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1151; re-en Sec. 9883, R.C.M. 1935; R.C.M. 1947, 93-9609.

25-14-310. Judgment unaffected. The judgment against any prisone who is discharged remains in full force against any estate which may then o at any time afterward belong to him, and the plaintiff may take out a new execution against the goods and estate of the prisoner in like manner as i he had never been committed.

History: En. Sec. 2069, C. Civ. Proc. 1895; re-en. Sec. 7266, Rev. C. 1907; re-en. Sec. 9884 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1152; re-en. Sec. 9884, R.C.M. 1935; R.C.M. 1947, 93-9610.

25-14-311. Discharge at instance of plaintiff. The plaintiff in the action may at any time order the prisoner to be discharged, and he is not thereafter liable to imprisonment for the same cause of action.

History: En. Sec. 115, p. 48, Cod. Stat. 1871; re-en. Sec. 153, p. 74, L. 1877; re-en. Sec. 153, 1st Div. Rev. Stat. 1879; re-en. Sec. 155, 1st Div. Comp. Stat. 1887; re-en. Sec. 2070, C. Civ. Proc. 1895; re-en. Sec. 7267, Rev. C. 1907; re-en. Sec. 9885, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1153; re-en. Sec. 9885, R.C.M. 1935; R.C.M. 1947, 93-9611.

25-14-312. Discharge upon failure of plaintiff to advance money for support of prisoner. Whenever a prisoner is committed to jail on an execution issued on a judgment recovered in a civil action, the creditor or his agent or attorney must advance to the jailer, on such commitment, sufficient money for the support of the prisoner for 1 week and must make the like advance for every successive week of his imprisonment, and in case of failure to do so, the jailer must forthwith discharge such prisoner from custody, and such discharge has the same effect as if made by order of the creditor.

History: En. Sec. 2071, C. Civ. Proc. Sec. 1895; re-en. Sec. 7268, Rev. C. 1907; re-en. Sec. 9886, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1154; re-en. Sec. 9886, R.C.M. 1935; R.C.M. 1947, 93-9612.

CHAPTER 15

LIABILITY OF JOINT DEBTORS

Part 1 — Applying Judgment to Joint Debtor

Section
25-15-101. Summoning joint debtor not originally served.
25-15-102. Content and service of summons.
25-15-103. Affidavit to accompany summons — new complaint unnecessary.
25-15-104. Answer — time for filing, contents.
25-15-105. What constitute the pleadings.
25-15-106. Trial of issues — limit on verdict.

Part 2 — Discharge of Joint Debtor

-15-201. Discharge of one joint debtor.
-15-202. Effect of discharge — right of contribution.

Part 1

Applying Judgment to Joint Debtor

25-15-101. Summoning joint debtor not originally served. When judgment is recovered against one or more of several persons, jointly ndebted upon an obligation, by proceeding as provided in Rule 4D(10), I.R.Civ.P., those who were not originally served with the summons and did ot appear to the action may be summoned to show cause why they should ot be bound by the judgment in the same manner as though they had been riginally served with the summons.

History: En. Sec. 291, p. 104, Bannack Stat.; re-en. Sec. 346, p. 205, L. 1867; re-en. Sec. 420, 119, Cod. Stat. 1871; re-en. Sec. 446, p. 161, L. 1877; re-en. Sec. 446, 1st Div. Rev. Stat. 1879; -en. Sec. 459, 1st Div. Comp. Stat. 1887; re-en. Sec. 1780, C. Civ. Proc. 1895; re-en. Sec. 7129, Rev. 1907; re-en. Sec. 9762, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 989; re-en. Sec. 9762, R.C.M. 1935; .C.M. 1947, 93-8101.

25-15-102. Content and service of summons. The summons, as rovided in 25-15-101, must describe the judgment and require the person ummoned to show cause why he should not be bound by it and must be erved in the same manner and returnable within the same time as the orig-al summons.

History: En. Sec. 292, p. 104, Bannack Stat.; re-en. Sec. 347, p. 205, L. 1867; re-en. Sec. 421, 119, Cod. Stat. 1871; re-en. Sec. 447, p. 161, L. 1877; re-en. Sec. 447, 1st Div. Rev. Stat. 1879; -en. Sec. 460, 1st Div. Comp. Stat. 1887; re-en. Sec. 1781, C. Civ. Proc. 1895; re-en. Sec. 7130, Rev. 1907; re-en. Sec. 9763, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 990; re-en. Sec. 9763, R.C.M. 1935; .C.M. 1947, 93-8102(part).

25-15-103. Affidavit to accompany summons — new complaint nnecessary. The summons must be accompanied by an affidavit of the laintiff or his agent, representative, or attorney that the judgment or some art thereof remains unsatisfied and must specify the amount due thereon. is not necessary to file a new complaint.

History: Ap. p. Sec. 293, p. 104, Bannack Stat.; re-en. Sec. 348, p. 205, L. 1867; re-en. Sec. 422, 119, Cod. Stat. 1871; re-en. Sec. 448, p. 161, L. 1877; re-en. Sec. 448, 1st Div. Rev. Stat. 1879; -en. Sec. 461, 1st Div. Comp. Stat. 1887; re-en. Sec. 1782, C. Civ. Proc. 1895; re-en. Sec. 7131, Rev. 1907; re-en. Sec. 9764, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 991; re-en. Sec. 9764, R.C.M. 1935; ec. 93-8103, R.C.M. 1947; Ap. p. Sec. 292, p. 104, Bannack Stat.; re-en. Sec. 347, p. 205, L. 1867; -en. Sec. 421, p. 119, Cod. Stat. 1871; re-en. Sec. 447, p. 161, L. 1877; re-en. Sec. 447, 1st Div. ev. Stat. 1879; re-en. Sec. 460, 1st Div. Comp. Stat. 1887; re-en. Sec. 1781, C. Civ. Proc. 1895; re-en. ec. 7130, Rev. C. 1907; re-en. Sec. 9763, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 990; re-en. Sec. 9763, .C.M. 1935; Sec. 93-8102, R.C.M. 1947; R.C.M. 1947, 93-8102(part), 93-8103.

25-15-104. Answer — time for filing, contents. Upon such sum-ons, the defendant may answer within the time specified therein, denying e judgment or setting up any defense which may have arisen subsequently;

or he may deny his liability on the obligation upon which the judgment wa recovered, except a discharge from such liability by the statute of limitations

History: En. Sec. 294, p. 105, Bannack Stat.; re-en. Sec. 349, p. 205, L. 1867; re-en. Sec. 423 p. 119, Cod. Stat. 1871; re-en. Sec. 449, p. 161, L. 1877; re-en. Sec. 449, 1st Div. Rev. Stat. 1879 re-en. Sec. 462, 1st Div. Comp. Stat. 1887; re-en. Sec. 1783, C. Civ. Proc. 1895; re-en. Sec. 7132, Rev C. 1907; re-en. Sec. 9765, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 992; re-en. Sec. 9765, R.C.M. 1935 R.C.M. 1947, 93-8104.

25-15-105. What constitute the pleadings. If the defendant in his answer deny the judgment or set up any defense which may have arisen subsequently, the summons, with the affidavit annexed, and the answer constitute the written allegations in the case; if he deny his liability on the obligation upon which the judgment was recovered, a copy of the origina complaint and judgment, the summons, with the affidavit annexed, and the answer constitute such written allegations.

History: En. Sec. 295, p. 105, Bannack Stat.; re-en. Sec. 350, p. 205, L. 1867; re-en. Sec. 424 p. 119, Cod. Stat. 1871; re-en. Sec. 450, p. 161, L. 1877; re-en. Sec. 450, 1st Div. Rev. Stat. 1879 re-en. Sec. 463, 1st Div. Comp. Stat. 1887; re-en. Sec. 1784, C. Civ. Proc. 1895; re-en. Sec. 7133, Rev C. 1907; re-en. Sec. 9766, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 993; re-en. Sec. 9766, R.C.M. 1935 R.C.M. 1947, 93-8105.

25-15-106. Trial of issues — limit on verdict. The issues formed may be tried as in other cases; but when the defendant denies in his answer any liability on the obligation upon which the judgment was rendered, if a verdict be found against him, it must be for not exceeding the amount remaining unsatisfied on such original judgment, with interest thereon.

History: En. Sec. 296, p. 105, Bannack Stat.; re-en. Sec. 351, p. 205, L. 1867; re-en. Sec. 425, p. 119, Cod. Stat. 1871; re-en. Sec. 451, p. 161, L. 1877; re-en. Sec. 451, 1st Div. Rev. Stat. 1879; re-en. Sec. 464, 1st Div. Comp. Stat. 1887; re-en. Sec. 1785, C. Civ. Proc. 1895; re-en. Sec. 7134, Rev. C. 1907; re-en. Sec. 9767, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 994; re-en. Sec. 9767, R.C.M. 1935; R.C.M. 1947, 93-8106.

Part 2

Discharge of Joint Debtor

25-15-201. Discharge of one joint debtor. Any joint debtor, including a partner, may compromise with a creditor, and a discharge to him by such creditor is as effectual as if made to all debtors, but such discharge does not relieve the other joint debtors. Any creditor can release a judgment in his favor against any one or more joint debtors, and such release does not discharge the others.

History: En. Sec. 1786, C. Civ. Proc. 1895; re-en. Sec. 7135, Rev. C. 1907; re-en. Sec. 9768, R.C.M. 1921; re-en. Sec. 9768, R.C.M. 1935; R.C.M. 1947, 93-8107.

25-15-202. Effect of discharge — right of contribution. The discharge of such joint debtor operates as a payment to the creditor equal to the proportionate interest of the debtor discharged, but the discharge of such debtor does not prevent his codebtors from enforcing the right of contribution in case they are compelled to pay the whole of the debt.

History: En. Sec. 1787, C. Civ. Proc. 1895; re-en. Sec. 7136, Rev. C. 1907; re-en. Sec. 9769, R.C.M. 1921; re-en. Sec. 9769, R.C.M. 1935; R.C.M. 1947, 93-8108.

CHAPTERS 16 THROUGH 19

RESERVED

CHAPTER 20

RULES OF CIVIL PROCEDURE

I. Scope of Rules — One Form of Action

ule

1. Scope of rules.
2. One form of action.

II. Commencement of Action — Service of Process, Pleadings, Motions, and Orders

3. Commencement of action.
4. Persons subject to jurisdiction — process — service.
    A. Definition of person.
    B. Jurisdiction of persons.
        (1) Subject to jurisdiction.
        (2) Acquisition of jurisdiction.
    C. Process.
        (1) Summons — issuance.
        (2) Summons — form.
    D. Service.
        (1) By whom served.
        (2) Personal service within the state.
        (3) Personal service outside the state.
        (4) Other service.
        (5) Service by publication.
            (a) When permitted.
            (b) Effect of service by publication.
            (c) Filing of pleading and affidavit for service by publication; and order for publication.
            (d) Number of publications.
            (e) Mailing summons and complaint.
            (f) Time when first publication or service outside state must be made.
            (g) When service by publication or outside state complete.
            (h) Additional information to be published.
        (6) Service on secretary of state.
        (7) Amendment.
        (8) Proof of service.
        (9) Contents of affidavit of service.
        (10) Procedure where only part of defendants are served.
5. Service and filing of pleadings and other papers.
    (a) Service — when required.
    (b) Service — how made.
    (c) Service — numerous defendants.
    (d) Filing.
    (e) Filing with the court defined.
    (f) Proof of service.
6. Time.
    (a) Computation.
    (b) Enlargement.
    (c) Unaffected by expiration of term.
    (d) For motions — affidavits.
    (e) Additional time after service by mail.

III. Pleadings and Motions

7. Pleadings allowed — form of motions.
    (a) Pleadings.
    (b) Motions and other papers.
    (c) Demurrers, pleas, etc., abolished.
8. General rules of pleading.
    (a) Claims for relief.
    (b) Defenses — form of denials.
    (c) Affirmative defenses.
    (d) Effect of failure to deny.
    (e) Pleading to be concise and direct — consistency.
    (f) Construction of pleadings.
9. Pleading special matters.
    (a) Capacity.
    (b) Fraud, mistake, condition of the mind.
    (c) Conditions precedent.
    (d) Official document, act, ordinance or statute.
    (e) Judgment.
    (f) Time and place.
    (g) Special damage.
10. Form of pleading.
    (a) Caption — names of parties.
    (b) Paragraphs — separate statements.
    (c) Adoption by reference — exhibits.
11. Signing of pleadings.
12. Defenses and objections — when and how presented — by pleading or motion — fo judgment on pleadings.
    (a) When presented.
    (b) How presented.
    (c) Motion for judgment on the pleadings.
    (d) Preliminary hearings.
    (e) Motion for more definite statement.
    (f) Motion to strike.
    (g) Consolidation of defenses in motion.
    (h) Waiver of preservation of certain defenses.
13. Counterclaim and cross-claim.
    (a) Compulsory counterclaims.
    (b) Permissive counterclaims.
    (c) Counterclaim exceeding opposing claim.
    (d) Counterclaim against the state.
    (e) Counterclaim maturing or acquired after pleading.
    (f) Omitted counterclaim.
    (g) Cross-claim against coparty.
    (h) Joinder of additional parties.
    (i) Separate trials — separate judgments.
14. Third-party practice.
    (a) When defendant may bring in the third party.
    (b) When plaintiff may bring in third party.
15. Amended and supplemental pleadings.
    (a) Amendments.
    (b) Amendments to conform to the evidence.
    (c) Relation back of amendments.
    (d) Supplemental pleadings.
16. Pretrial procedure — formulating issues.

IV. Parties

17. Parties plaintiff and defendant — capacity.
    (a) Real party in interest.
    (b) Capacity to sue or be sued.
    (c) Infants or incompetent persons.
18. Joinder of claims and remedies.
    (a) Joinder of claims.

(b) Joinder of remedies — fraudulent conveyances.
9. Joinder of persons needed for just adjudication.
(a) Persons to be joined if feasible.
(b) Determination by court of whenever joinder not feasible.
(c) Pleading reasons for nonjoinder.
(d) Exception of class actions.
0. Permissive joinder of parties.
(a) Permissive joinder.
(b) Separate trials.
1. Misjoinder and nonjoinder of parties.
2. Interpleader.
(a) By joinder, cross-claim or counterclaim.
(b) By substitution.
3. Class actions.
(a) Prerequisites to a class action.
(b) Class actions maintainable.
(c) Determination by order whether class action to be maintained — notice — judgment — actions conducted partially as class actions.
(d) Order in conduct of actions.
(e) Dismissal or compromise.
(f) Security for costs.
3.1 Derivative actions by shareholders.
3.2 Actions relating to unincorporated associations.
4. Intervention.
(a) Intervention of right.
(b) Permissive intervention.
(c) Procedure.
5. Substitution of parties.
(a) Death.
(b) Incompetency.
(c) Transfer of interest.
(d) Substitution of successor to public officer.

V. Depositions and Discovery

6. General provisions governing discovery.
(a) Discovery methods.
(b) Scope of discovery.
(c) Protective orders.
(d) Sequence and timing of discovery.
(e) Supplementation of response.
7. Depositions before action or pending appeal.
(a) Before action.
(b) Pending appeal.
(c) Perpetuation by petition.
8. Persons before whom depositions may be taken.
(a) Within the United States.
(b) In foreign countries.
(c) Disqualification for interest.
(d) Depositions to be used in other states.
(e) Deposition to be taken in sister states and foreign countries for use in this state.
9. Stipulations regarding discovery procedure.
30. Depositions upon oral examination.
(a) When depositions may be taken.
(b) Notice of examination; general requirements — special notice — nonstenographic recording — production of documents and things — deposition of organization.
(c) Examination and cross-examination — record of examination — oath — objections.
(d) Motion to terminate or limit examination.
(e) Submission to witness — changes — signing.
(f) Certification and filing by officer — exhibits — copies — notice of filing.
(g) Failure to attend or to serve subpoena — expenses.
31. Depositions upon written questions.
(a) Serving questions — notice.

  - (b) Officer to take responses and prepare record.
  - (c) Notice of filing.
- 32. Use of depositions in court proceedings.
  - (a) Use of depositions.
  - (b) Objections to admissibility.
  - (c) Effect of taking or using depositions.
  - (d) Effect of errors and irregularities in depositions.
- 33. Interrogatories to parties.
  - (a) Availability — procedures for use.
  - (b) Scope — use at trial.
  - (c) Option to produce business records.
- 34. Production of documents and things and entry upon land for inspection and other purposes.
  - (a) Scope.
  - (b) Procedure.
  - (c) Persons not parties.
- 35. Physical and mental examination of persons.
  - (a) Order for examination.
  - (b) Report of examining physician.
- 36. Requests for admissions.
  - (a) Request for admission.
  - (b) Effect of admission.
- 37. Failure to make discovery: sanctions.
  - (a) Motion for order compelling discovery.
  - (b) Failure to comply with order.
  - (c) Expenses on failure to admit.
  - (d) Failure of party to attend at own deposition or serve answers in interrogatories or respond to request for inspection.

VI. Trials

- 38. Jury trial of right.
  - (a) Right reserved.
  - (b) Demand.
  - (c) [Demand] — specification of issues.
  - (d) Waiver.
- 39. Trial by jury or by the court.
  - (a) By jury.
  - (b) By the court.
  - (c) Advisory jury and trial by consent.
- 40. Assignment of cases for trial.
- 41. Dismissal of actions.
  - (a) Voluntary dismissal — effect thereof.
    - (1) By plaintiff — by stipulation.
    - (2) By order of court.
  - (b) Involuntary dismissal — effect thereof.
  - (c) Dismissal of counterclaim, cross-claim, or third-party claim.
  - (d) Costs of previously-dismissed action.
  - (e) Failure to serve summons.
- 42. Consolidation — separate trials.
  - (a) Consolidation.
  - (b) Separate trials.
- 43. Evidence.
  - (b) Scope of examination and cross-examination.
  - (c) Record of excluded evidence.
  - (d) Affirmation in lieu of oath.
  - (e) Evidence on motions.
  - (f) Interpreters.
- 44. Proof of official record.
  - (a) Authentication.
  - (b) Lack of record.
  - (c) Other proof.
- 44.1 Determination of foreign law.

5. Subpoena.
   (a) For attendance of witnesses — form — issuance.
   (b) For production of documentary evidence.
   (c) Service.
   (d) Subpoena for taking depositions — place of examinations.
   (e) Subpoena for hearing or trial.
   (f) Contempt.
6. Exceptions unnecessary.
7. Jurors.
   (a) Examination of jurors.
   (b) Manner of selection and order of examination of jurors.
   (c) Alternate jurors.
8. Juries — verdict.
9. Special verdicts and interrogatories.
   (a) Special verdicts.
   (b) General verdict accompanied by answer to interrogatories.
0. Motion for a directed verdict and for judgment notwithstanding the verdict.
   (a) Motion for directed verdict — when made, effect.
   (b) Motion for judgment notwithstanding the verdict.
   (c) Motion for judgment notwithstanding the verdict — conditional rulings on grant of motion.
   (d) Motion for judgment notwithstanding the verdict — denial of motion.
1. Instructions to jury — objection.
2. Findings by the court.
   (a) Effect.
   (b) Amendment.
3. Masters.
   (a) Appointment and compensation.
   (b) Reference.
   (c) Powers.
   (d) Proceedings.
      (1) Meetings.
      (2) Witnesses.
      (3) Statement of accounts.
   (e) Report.

VII. Judgment

4. Judgments — costs.
   (a) Definition — form.
   (b) Judgment upon multiple claims or involving multiple parties.
   (c) Demand for judgment.
   (d) Costs.
5. Default.
   (a) Entry.
   (b) Judgment.
   (c) Default — setting aside — extension of time by court or stipulation of parties.
   (d) Plaintiffs, counterclaims, cross-claimants.
6. Summary judgment.
   (a) For claimant.
   (b) For defending party.
   (c) Motion and proceedings thereon.
   (d) Case not fully adjudicated on motion.
   (e) Form of affidavits — further testimony — defense required.
   (f) When affidavits are unavailable.
   (g) Affidavits made in bad faith.
7. Declaratory judgments.
8. Entry of judgment.
9. New trials — amendment of judgment.
   (a) Grounds.
   (b) Time for motion.
   (c) Time for serving affidavits.
   (d) Time for hearing on motion.

- (e) On initiative of court.
- (f) Order granting a new trial.
- (g) Motion to alter or amend a judgment.

60. Relief from judgment or order.
    - (a) Clerical mistakes.
    - (b) Mistakes — inadvertence — excusable neglect — newly discovered evidence — fraud, etc.
    - (c) Time for hearing and determining motions.
61. Harmless error.
62. Stay of proceedings to enforce a judgment.
    - (a) Superseded — M.R.App.Civ.P., Rule 7.
    - (b) Stay on motion for new trial or for judgment.
    - (c) Injunction pending appeal.
    - (d) Superseded — M.R.App.Civ.P., Rule 7.
    - (e) Stay in favor of the state of Montana or agency thereof.
    - (g) Power of appellate court not limited.
    - (h) Stay of judgment upon multiple claims.

VIII. Provisional and Final Remedies and Special Proceedings

64. Seizure of person or property.
65. Injunctions.
66. Receivers.
67. Deposit in court.
68. Offer of judgment.
69. Execution.
70. Judgment for specific acts — vesting title.
71. Process in behalf of and against persons not parties.

IX. Appeals

72. Appeal from a district court to the supreme court.

X. District Courts and Clerks

77. District courts and clerks.
    - (a) District courts always open.
    - (b) Trials and hearings — orders in chambers.
    - (c) Clerks's office and orders by clerk.
    - (d) Notice of orders or judgments.
    - (e) Transmittal of file on removal.
80. Stenographer — stenographic report or transcript as evidence.

XI. General Provisions

81. Applicability in general.
    - (a) Special statutory proceedings.
    - (b) Appeals to district courts.
    - (c) Rules incorporated into statutes.
82. Jurisdiction and venue unaffected.
83. Rules by district courts.
84. Forms.
85. Title.
86. Effective date — statutes superseded.
    - (a) Effective date and application to pending proceedings.
    - (b) Statutes superseded.

Appendix of forms

Form
1. Summons — official form in the district court of the .... judicial district of the state of Montana, in and for the county of .....
2. Complaint on a promissory note.

3. Complaint on an account.
4. Complaint for goods sold and delivered.
5. Complaint for money lent.
6. Complaint for money paid by mistake.
7. Complaint for money had and received.
8. Complaint for negligence.
9. Complaint for negligence where plaintiff is unable to determine definitely whether the person responsible is c. d. or e. f. or whether both are responsible and where his evidence may justify a finding of willfulness or of recklessness or of negligence.
0. Complaint for conversion.
1. Complaint for specific performance of contract to convey land.
2. Complaint on claim for debt and to set aside fraudulent conveyance under rule 18(b).
3. Complaint for negligence under federal employees' liability act (45 U.S.C.A., §§51-58).
4. Complaint for interpleader and declaratory relief.
5. Motion to dismiss.
6. Answer presenting defenses under rule 12(b).
7. Answer to complaint set forth in form 7, with counterclaim for interpleader.
8. Summons and third-party complaint — interpleader.
9. Motion to intervene as a defendant under rule 24.
20. Motion for production, etc., under rule 34.
21. Request for admission under rule 36.
22. Allegation of reason for omitting necessary party.
23. Supersedeas bond.

I. Scope of Rules — One Form of Action

Rule 1. Scope of rules. These rules govern the procedure in the district courts of the state of Montana in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81; provided, however, that the discovery procedures set forth in Rules 26 through 37, inclusive, shall be applicable to proceedings in probate. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

History: En. Sec. 1, Ch. 13, L. 1961.

Rule 2. One form of action. There shall be one form of action to be known as "Civil Action."

History: En. Sec. 2, Ch. 13, L. 1961.

II. Commencement of Action — Service of Process, Pleadings, Motions, and Orders

Rule 3. Commencement of action. A civil action is commenced by filing a complaint with the court.

History: En. Sec. 3, Ch. 13, L. 1961.

Rule 4. Persons subject to jurisdiction — process — service

Rule 4A. Definition of person. As used in this rule, the word "person," whether or not a citizen or resident of this state and whether or not organized under the laws of this state, includes an individual whether operating in his own name or under a trade name; an individual's agent or personal representative; a corporation; a business trust; an estate; a trust; a partnership; an unincorporated association; and any two or more persons having a joint or common interest or any other legal or commercial entity.

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

Rule 4B. Jurisdiction of persons. (1) Subject to jurisdiction. All persons found within the state of Montana are subject to the jurisdiction of the courts of this state. In addition, any person is subject to the jurisdiction of the courts of this state as to any claim for relief arising from the doing personally, through an employee, or through an agent, of any of the following acts:

(a) the transaction of any business within this state;

(b) the commission of any act which results in accrual within this state of a tort action;

(c) the ownership, use or possession of any property, or of any interest therein, situated within this state;

(d) contracting to insure any person, property or risk located within this state at the time of contracting;

(e) entering into a contract for services to be rendered or for materials to be furnished in this state by such person; or

(f) acting as director, manager, trustee, or other officer of any corporation organized under the laws of, or having its principal place of business within this state, or as executor or administrator of any estate within this state.

(2) Acquisition of jurisdiction. Jurisdiction may be acquired by our courts over any person through service of process as herein provided; or by the voluntary appearance in an action by any person either personally, or through an attorney, or through any other authorized officer, agent or employee.

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

Rule 4C. Process. (1) Summons — issuance. Upon the filing of the complaint, the clerk shall forthwith issue a summons, and shall deliver the summons either to the sheriff of the county in which the action is filed, or to the person who is to serve it, or upon request, to the attorney for said party who shall thereafter be responsible to see that the summons is served in the manner prescribed by these rules. Upon request, separate or additional summons shall issue against any parties designated in the original action, or against any additional parties who may be brought into the action.

(2) Summons — form. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. In an action brought to quiet title to real estate, there shall be added to the foregoing, the following: "This action is brought for the purpose of quieting title to land situated in ... County, Montana, and described as follows: (Here

insert descriptions of land.).” For exceptions to this form of summons see 4D(4) “Other service,” set forth hereinafter.

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 4D. Service. (1) By whom served. Service of all process shall be made by a sheriff of the county where the party to be served is found, by his deputy, by a constable authorized by law, or by any other person over the age of 18 not a party to the action, except that a subpoena may be served as provided in Rule 45.

(2) Personal service within the state. The summons and complaint shall be served together, unless two or more defendants are residents of the same county, in which case a copy of the complaint need only be served upon one of such defendants. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(a) Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to him personally or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process, provided that if the agent is one designated by statute to receive service, such further notice as the statute requires shall be given.

(b) Upon a minor over the age of 14 years, by delivering a copy of the summons and complaint to him personally, and by leaving a copy thereof at his dwelling house or usual place of abode with some adult of suitable discretion then residing therein, or by delivering a copy of the summons and complaint to an agent authorized by appointment or by law to receive service of process.

(c) Upon a minor under the age of 14 years, by delivering a copy of the summons and complaint to his guardian, if he has one within the state, and if not, then to his father or mother or other person or agency having his care or control, or with whom he resides, or if service cannot be made upon any of them, then as provided by order of the court.

(d) Upon a person who has been adjudged of unsound mind by a court of this state, or for whom a guardian has been appointed in this state by reason of incompetency, by delivering a copy of the summons and complaint to his guardian, if there be a guardian residing in this state appointed and acting under the laws of this state. If there be no such guardian, the court shall appoint a guardian ad litem for the incompetent person, with or without personal service on the incompetent, as the court may direct. When a party is alleged to be of unsound mind, but has not been so adjudged by a court of this state, such party may be brought into court by service of process personally upon him. The court may also stay any action pending against a person on learning that such person is of unsound mind.

(e) Upon a domestic corporation, partnership or other unincorporated association, or upon a foreign corporation, partnership or other unincorporated association, established by the laws of any other state or country, and having a place of business within this state or doing business herein either permanently or temporarily, or which was doing business herein either permanently, or temporarily at the time the claim for relief accrued: (i) by delivering a copy of the summons and complaint to an officer, director, superintendent or managing or general agent, or partner, or associate for such corporation, partnership, or association; or by leaving such copies at the office or place of business of the corporation, partnership, or association within the state with the person in charge of such office; or (ii) by delivering a copy of the summons and complaint to the registered agent of said corporation named on the records of the secretary of state, or to any other agent or attorney in fact authorized by appointment or by statute to receive or accept service on behalf of the corporation, partnership, or association, provided that if the agent or attorney in fact is one designated by statute to receive service, such further notice as the statute requires shall also be given; or (iii) if the sheriff shall make return that no person upon whom service may be made can be found in the county, then service may be made by leaving a copy of the summons and complaint at any office of the corporation, partnership, or unincorporated association within this state with the person in charge of such office; or (iv) if the suit is against a corporation whose charter or right to do business in the state has expired or been forfeited, by delivering a copy thereof to any one of the persons who have become trustees for the corporation and its stockholders or members.

(f) When a claim for relief is pending in any court of this state against a corporation organized under the laws of this state, or against a corporation organized under the laws of any other state or country, that has filed a copy of its charter in the office of the secretary of state of Montana and qualified to do business in Montana; or against a corporation organized under the laws of any other state or country which is subject to the jurisdiction of the courts of this state under the provisions of Rule 4B above, even though such corporation has never qualified to do business in Montana; or against a national banking corporation which, through insolvency or lapse of charter, has ceased to do business in Montana; and none of the persons designated in D(2)(e) immediately above can with the exercise of reasonable diligence be found within Montana, the party causing summons to be issued shall exercise reasonable diligence to ascertain the last known address of any such person. Upon the filing with the clerk of court in which the claim for relief is pending of an affidavit reciting that none of the persons designated in D(2)(e) can after due diligence be found within Montana upon whom service of process can be made, and reciting the last known address of any such person, or reciting that after the exercise of reasonable diligence no such address for any such person could be found, and there has also been deposited with the said clerk the sum of $5 to be paid to the secretary of state as a fee for each of said defendants for whom the secretary of state is to receive said service, then the clerk of court shall issue an order directing process to be served upon the secretary of state of the state of Montana or, in his absence from his office, upon the deputy secretary of state of the state of Montana. Such affidavit shall be sufficient evidence of the diligence of inquiry made by affiant, if the affidavit recites that diligent inquiry was made, and the affidavit need not detail the facts constituting such inquiry. Whenever service is also to be made through publication as provided in 4D(5), or upon other persons as provided in 4D(6), the affidavit herein required may be combined in the same instrument with the affidavit required under 4D(5)(c) and 4D(6). The said clerk of court shall then mail to the secretary of state the original summons, one copy of the summons and one copy of the affidavit for the files of the secretary of state, one copy of the summons attached to a copy of the complaint for each of the defendants to be served by service upon the secretary of state, and the fee for service, to the office of the secretary of state. The secretary of state shall mail copy of the summons and complaint by certified or registered mail with a return receipt requested to the last known address of any of the persons designated in D(2)(e) above, if known, or, if none such is known and it is a corporation not organized in Montana, to the secretary of state of the state in which such corporation was originally incorporated, if known; and the secretary of state shall make his return as hereinafter provided under Rule 4D(6). When service is so made, it shall be deemed personal service on such corporation, and the said secretary of state, or his deputy when the secretary is absent from his office, is hereby appointed agent of such corporation for service of process in cases hereinbefore mentioned. In any action where due diligence has been exercised to locate and serve any of the persons designated in D(2)(e) above, service shall be deemed complete upon said corporation regardless of the receipt of any return receipt or advice of refusal of the addressee to receive the process mailed, as is hereinafter required by 4D(6); provided, however, that except in those actions where any of the persons designated in D(2)(e) above have been located and served personally as herinabove provided, then service by publication shall also be made as provided hereafter in 4D(5)(d) and 4D(5)(h); the first publication must be made within 60 days from the date the original summons is mailed to the secretary of state as herein provided, and if said first publication is not so made, the action shall be deemed dismissed as to any such party intended to be served by such publication; and service shall be complete upon the date of the last publication of summons.

When service of process is made as herein provided, and there is no appearance thereafter made by any attorney for such corporation, service of all other notices required by law to be served in such action may be served upon the secretary of state.

(g) Upon a city, village, town, school district, county, or public agency or board of any such public bodies, by delivering a copy of the summons and complaint to any commissioner, trustee, board member, mayor or head of the legislative department thereof.

(h) Upon the state, or any state board or state agency, by delivering a copy of the summons and complaint to the governor, or to any member of such state board or state agency, and also by delivering an additional copy of the summons and complaint to the attorney general.

(i) Upon an estate by delivering a copy of the summons and complaint to the personal representative thereof; upon a trust by delivering a copy of the summons and complaint to any trustee thereof.

(3) Personal service outside the state. Where service upon any person cannot, with due diligence, be made personally within this state, service of summons and complaint may be made by service outside this state in the manner provided for service within this state, with the same force and effect as though service had been made within this state. Where service by publication is permitted as hereinafter provided, personal service of a summons and complaint upon the defendant out of the state shall be equivalent to and shall dispense with the procedures and the publication and mailing provided for hereafter in 4(5)(c), 4(5)(d) and 4(5)(e) of this rule.

(4) Other service. All process in any form of action shall be served in the manner specified in this rule with the exception that whenever a statute of this state or an order of the court or a citation by the court made pursuant thereto provides for the service of a notice or of an order or of a citation in lieu of summons upon any person, service shall be made under the circumstances and in the manner prescribed by the statute or order or citation; and with the further exception that all persons are required to comply with the provisions hereafter prescribed in D(5)(h), and with the provisions of 33-1-603, 33-1-613, 33-1-614, 33-2-314, 33-2-315, 70-28-207, 70-28-208, 70-28-209, and 70-28-212, Montana Code Annotated, when the action pertains to the provisions of such sections.

(5) Service by publication — when permitted — effect — manner — proof.

(a) When permitted. A defendant, whether known or unknown, who has not been served under the foregoing subsections of this rule can be served by publication in the following situations only:

(i) When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest therein. This subsection shall apply whether any such defendant is known or unknown.

(ii) When the action is to foreclose, redeem from or satisfy a mortgage, claim or lien upon real or personal property within this state.

(iii) When the action is for divorce or for annulment of marriage of a resident of this state or for modification of a decree of divorce granted by a court of this state.

(iv) When the defendant has property within this state which has been attached or has a debtor within this state, who has been garnished. Jurisdiction under this subsection may be independent of or supplementary to jurisdiction acquired under subsections (5)(a)(i), (5)(a)(ii), and (5)(a)(iii) herein.

(b) Effect of service by publication. When a defendant, whether known or unknown, has been served by publication as provided in this rule, any court of this state having jurisdiction may render a decree which will adjudicate any interest of such defendant in the status, property, or thing acted upon, but it may not bind the defendant personally to the personal jurisdiction of the court unless some ground for the exercise of personal jurisdiction exists.

(c) Filing of pleading and affidavit for service by publication; and order for publication. Before service of the summons by publication is authorized in any case, there shall be filed with the clerk in the district court of the county in which the action is commenced (i) a pleading setting forth a claim in favor of the plaintiff and against the defendant in one of the situations defined in (5)(a) above; and (ii) in situations defined in (5)(a)(i), (5)(a)(ii), (5)(a)(iii), upon return of the summons showing the failure to find any defendant designated in the complaint, an affidavit stating that such defendant resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons; or, if the defendant is a domestic or foreign corporation, that none of the persons designated in D(2)(e) above can, after due diligence, be found within the state; or, if the defendant is an unknown claimant, by showing that he has made diligent search and inquiry for all persons who claim, or might claim any right, title, estate, or interest in, or lien, or encumbrance upon, such property, or any thereof, adverse to plaintiff's ownership, or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any right of dower, inchoate or accrued, and that he has specifically named as defendants in such action all such persons whose names can be ascertained; such affidavit shall be sufficient evidence of the diligence of any inquiry made by the affiant, if the affidavit recite the fact that diligent inquiry was made, and it need not detail the facts constituting such inquiry, and if desired, it may be combined in one instrument with the affidavit required under 4D(2)(f), or 4D(6); and (iii) in the situation defined in (5)(a)(iv) above, there must be first presented to the court proof that a valid attachment or garnishment has been effected. Upon complying herewith, the plaintiff may obtain an order for the service of summons to be made upon the defendants by publication, which order may be issued by either the judge or the clerk of the court.

(d) Number of publications. Service of the summons by publication may be made by publishing the same three times, once each week for 3 successive weeks, in a newspaper published in the county in which the action is pending, if a newspaper is published in such county, and if no newspaper is published in such county then in a newspaper published in an adjoining county and having a general circulation therein.

(e) Mailing summons and complaint. A copy of the summons for publication and complaint, at any time after the filing of the affidavit for publication and not later than 10 days after the first publication of the summons, shall be deposited in some post office in this state, postage prepaid, and directed to the defendant at his place of residence unless the affidavit for publication states that the residence of the defendant is unknown. If the defendant is a corporation, and personal service cannot with due diligence be effected within Montana on any of the persons designated in D(2)(e) above, then service may be completed on said corporation by service upon the secretary of state in the manner, and following the procedure outlined in D(2)(f) above.

(f) Time when first publication or service outside state must be made. The first publication of summons, or personal service of the summons and complaint upon the defendant out of the state, must be made within 60 days after the filing of the affidavit for publication. If not so made, the action shall be deemed dismissed as to any party intended to be served by such publication.

(g) When service by publication or outside state complete. Service by publication is complete on the date of the last publication of the summons, or in case of personal service of the summons and complaint upon the defendant out of the state, on the date of such service.

(h) Additional information to be published. In addition to the form of summons prescribed above in "C. Process, (2) Summons—form," the published summons shall state in general terms the nature of the action, and in all cases where publication of summons is made in an action in which the title to, or any interest in or lien upon real property is involved, or affected, or brought into question, the publication shall also contain a description of the real property involved, affected or brought into question thereby, and a statement of the object of the action.

(6) (a) Service on secretary of state. Whenever service is to be made upon certain corporations as provided hereinabove in D(2)(f) and D(5)(e), the requirements of said D(2)(f) must be complied with. In all other cases, unless otherwise provided by statute, whenever the secretary of state of the state of Montana has been appointed, or is deemed by law to have been appointed, as the agent to receive service of process for any person who cannot with due diligence be found or served personally within Montana, the party, or his attorney, shall make an affidavit stating the facts showing that the secretary of state is such agent, and stating the residence and last known post-office address of the person to be served, and shall file such affidavit with the clerk of court in which such claim for relief is pending, accompanied by sufficient copies of the affidavit, summons and complaint for service upon the secretary of state, and there has also been deposited with the clerk of the court in which such claim for relief is pending the sum of $5 to be paid to the secretary of state as a fee for each of said defendants for whom the secretary of state is to receive such service; then the clerk shall forward the original summons, one copy of the summons and one copy of the affidavit for the files of the secretary of state, and one copy of the summons attached to copy of the complaint for each of the defendants to be served by service upon the secretary of state, and the fee, to the office of the secretary of state.

Such service on the secretary of state shall be sufficient personal service upon the person to be served, provided that notice of such service and a copy of the summons and complaint are forthwith sent by registered or certified mail by the secretary of state or his deputy to the party to be served at his last known address, marked "Deliver to Addressee Only" and "Return Receipt Requested," and provided further that such return receipt shall be received by the secretary of state purporting to have been signed by said addressee, or the secretary of state shall be advised by the postal authority that delivery of said registered or certified mail was refused by said addressee, except in those cases where compliance is excused under the provisions of D(2)(f) above. The date upon which the secretary of state receives said return receipt, or receives advice by the postal authority that delivery of said registered or certified mail was refused by the addressee, shall be deemed the date of service.

As an alternative to sending the summons and complaint by registered or certified mail, as herein provided, the secretary of state, or his deputy, may cause copy of the summons and complaint to be served by any qualified law enforcement officer, in accord with the procedure set out in D(1), (2) or (3) of this rule.

The secretary of state, or his deputy, shall make an original and two copies of an affidavit reciting: (1) the fact of service upon him by the clerk of court, including the day, and hour of such service; (2) the fact of his mailing a copy of the summons and complaint and notice to the defendant, including the day and hour thereof, except in those cases where he is relieved from doing so under the provisions of D(2)(f) in which cases his affidavit shall so recite; and (3) the fact of his receipt of a return from the postal department including the date, and hour thereof, and attaching to his affidavit a copy of such return. The secretary of state, or his deputy, shall then transmit the original summons, and his original affidavit along with copy of his notice to the defendant where such notice was required, to the clerk of court in which the claim for relief is pending, and it shall be filed in the claim for relief by said clerk of court; and the secretary of state shall also transmit to the attorney for the plaintiff copy of the affidavit of the secretary of state along with copy of the notice to the defendant where such notice was required. The secretary of state shall keep on file in his office a copy of the summons, a copy of the affidavit served on him by the clerk of court, and a copy of the affidavit executed and issued by the secretary of state.

(b) Continuance to allow defense. In any of the cases provided for in Rule 4D(2)(f) above, or provided for hereinabove in 4D(6)(a), the court in which the claim for relief is pending may order such continuance as may be necessary to afford reasonable opportunity to defend the action.

(7) Amendment. At any time, in its discretion, and upon such notice and terms as it deems just, the court may allow any process or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

(8) Proof of service. Proof of the service of the summons and of the complaint or notice, if any, accompanying the same must be as follows:

(a) If served by the sheriff or other officer, his certificate thereof;

(b) If by any other person, his affidavit thereof;

(c) In case of publication an affidavit of the publisher and an affidavit of the deposit of a copy of the summons and complaint in the post office as required by law, if the same shall have been deposited; or

(d) The written admission of the defendant showing the date and place of service.

The certificate or affidavit of service mentioned in this subdivision must state the time, date, place, and manner of service.

(9) Contents of affidavit of service. Whenever a process, pleading, order of court, or other paper is served personally by a person other than the sheriff or person designated by law, the affidavit of service when made, shall state that the person so serving is of legal age, and the date and place of making the service. It also shall state that the person making such service knew the person served to be the person named in the papers served and the person intended to be served.

(10) Procedure where only part of defendants are served. If the summons is served on one or more, but not all, of the defendants, the plaintiff may proceed to trial and judgment against the defendant or defendants on whom the process is served, and may at any time thereafter have a summons against the defendant not served with the first process to cause him to appear in said court to show cause why he should not be made a party to such judgment. Upon such defendant being duly served with such process, the court shall hear and determine the matter in the same manner as if such defendant had been originally brought into court, and such defendant shall also be allowed the benefit of any payment or satisfaction which may have been made on the judgment before recovered.

History: En. Sec. 4, Ch. 13, L. 1961; amd. Sec. 1, Ch. 189, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750, Nov. 28, 1966, eff. Jan. 1, 1967; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff.

Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972; amd. Sup. Ct. Ord. 10750 Dec. 31, 1975, eff. March 1, 1976.

Rule 5. Service and filing of pleadings and other papers

Rule 5(a). Service — when required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

History: En. Sec. 5, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968 amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 5(b). Service — how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his las known address or, if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mai is complete upon mailing.

History: En. Sec. 5, Ch. 13, L. 1961.

Rule 5(c). Service — numerous defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

History: En. Sec. 5, Ch. 13, L. 1961.

Rule 5(d). Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

History: En. Sec. 5, Ch. 13, L. 1961.

Rule 5(e). Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with him, in which event he shall note thereon the filing date and forthwith transmit them to the office of the clerk.

History: En. Sec. 5, Ch. 13, L. 1961.

Rule 5(f). Proof of service. Proof of service shall be made by an affidavit of the party or his attorney making service, or by the certificate of his resident attorney making service or by an acknowledgment in writing from the party or attorney served, and such affidavit, certificate or acknowledgment shall be filed within 10 days after service. Failure to make proof of service does not affect the validity of the service.

History: En. Sec. 5, Ch. 13, L. 1961.

Rule 6. Time

Rule 6(a). Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday nor a holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday.

History: En. Sec. 6, Ch. 13, L. 1961.

Rule 6(b). Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50(b), 52(b), 59(b), (d), (e) and (f), and 60(b), except to the extent and under the conditions stated in them.

History: En. Sec. 6, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Rule 6(c). Unaffected by expiration of term. The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

History: En. Sec. 6, Ch. 13, L. 1961.

Rule 6(d). For motions — affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time.

History: **En. Sec. 6, Ch. 13, L. 1961.**

Rule 6(e). Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him and the notice or paper is served upon him by mail, 3 days shall be added to the prescribed period.

History: **En. Sec. 6, Ch. 13, L. 1961.**

III. Pleadings and Motions

Rule 7. Pleadings allowed — form of motions

Rule 7(a). Pleadings. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; and an answer to a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14; and there shall be a third-party answer if a third-party complaint is served. No other pleading shall be allowed except that the court may order a reply to an answer or a third-party answer

History: **En. Sec. 7, Ch. 13, L. 1961.**

Rule 7(b). Motions and other papers. (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

History: **En. Sec. 7, Ch. 13, L. 1961.**

Rule 7(c). Demurrers, pleas, etc., abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

History: **En. Sec. 7, Ch. 13, L. 1961.**

Rule 8. General rules of pleading

Rule 8(a). Claims for relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

History: En. Sec. 8, Ch. 13, L. 1961.

Rule 8(b). Defenses — form of denials. A party shall state in short nd plain terms his defenses to each claim asserted and shall admit or deny he averments upon which the adverse party relies. If he is without knowledge or information sufficient to form a belief as to the truth of an averment, e shall so state and this has the effect of a denial. Denials shall fairly meet he substance of the averments denied. When a pleader intends in good faith o deny only a part or a qualification of an averment, he shall specify so nuch of it as is true and material and shall deny only the remainder. Unless he pleader intends in good faith to controvert all the averments of the pre- eding pleading, he may make his denials as specific denials of designated verments or paragraphs, or he may generally deny all the averments except uch designated averments or paragraphs as he expressly admits; but, when e does so intend to controvert all its averments, including averments of the rounds upon which the court's jurisdiction depends, he may do so by general denial subject to the obligations set forth in Rule 11.

History: En. Sec. 8, Ch. 13, L. 1961; amd. Sup. Ct. Ord. June 1, 1964, eff. July 1, 1964.

Rule 8(c). Affirmative defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration nd award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by ellow servant, laches, license, payment, release, res judicata, statute of rauds, statute of limitations, waiver, and any other matter constituting an voidance or affirmative defense. When a party has mistakenly designated a efense as a counterclaim or a counterclaim as a defense, the court on terms, justice so requires, shall treat the pleading as if there had been a proper esignation.

History: En. Sec. 8, Ch. 13, L. 1961; amd. Sup. Ct. Ord. June 1, 1964, eff. July 1, 1964.

Rule 8(d). Effect of failure to deny. Averments in a pleading to hich a responsive pleading is required, other than those as to the amount f damage, are admitted when not denied in the responsive pleading. verments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

History: En. Sec. 8, Ch. 13, L. 1961.

Rule 8(e). Pleading to be concise and direct — consistency. (1) ach averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motion are required.

(2) A party may set forth two or more statements of a claim or defense ternately or hypothetically, either in one count or defense or in separate unts or defenses. When two or more statements are made in the alternative nd one of them if made independently would be sufficient, the pleading is ot made insufficient by the insufficiency of one or more of the alternative atements. A party may also state as many separate claims or defenses as e has regardless of consistency and whether based on legal or on equitable

grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.

History: **En. Sec. 8, Ch. 13, L. 1961.**

Rule 8(f). Construction of pleadings. All pleadings shall be so construed as to do substantial justice.

History: **En. Sec. 8, Ch. 13, L. 1961.**

Rule 9. Pleading special matters

Rule 9(a). Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued in a representative capacity, he shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

History: **En. Sec. 9, Ch. 13, L. 1961.**

Rule 9(b). Fraud, mistake, condition of the mind. In all averment of fraud or mistake, the circumstances constituting fraud or mistake shall b stated with particularity. Malice, intent, knowledge, and other condition o mind of a person may be averred generally.

History: **En. Sec. 9, Ch. 13, L. 1961.**

Rule 9(c). Conditions precedent. In pleading the performance o occurrence of conditions precedent, it is sufficient to aver generally that al conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

History: **En. Sec. 9, Ch. 13, L. 1961.**

Rule 9(d). Official document, act, ordinance or statute. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law. In pleading an ordinance or regulation of any county, city, village, or other political subdivision of this state, or any special, local or private statute, or any right derive therefrom, or the laws of another jurisdiction, it is sufficient to refer to th ordinance, regulation, statute or law by its title and the date of its passage or by the appropriate designation in the official or recognized compilatio thereof.

History: **En. Sec. 9, Ch. 13, L. 1961.**

Rule 9(e). Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or office it is sufficient to aver the judgment or decision without setting forth matte showing jurisdiction to render it.

History: **En. Sec. 9, Ch. 13, L. 1961.**

Rule 9(f). Time and place. For the purpose of testing the sufficienc of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

History: **En. Sec. 9, Ch. 13, L. 1961.**

Rule 9(g). Special damage. When items of special damage are claimed, they shall be specifically stated.

History: En. Sec. 9, Ch. 13, L. 1961.

Rule 10. Form of pleadings

Rule 10(a). Caption — names of parties. Every pleading shall contain a caption setting forth the name, district and county of the court, the title of the action, the number of the action, and a designation as in Rule 7(a). In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

History: En. Sec. 10, Ch. 13, L. 1961.

Rule 10(b). Paragraphs — separate statements. All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

History: En. Sec. 10, Ch. 13, L. 1961.

Rule 10(c). Adoption by reference — exhibits. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

History: En. Sec. 10, Ch. 13, L. 1961.

Rule 11. Signing of pleadings. Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

History: En. Sec. 11, Ch. 13, L. 1961.

Rule 12. Defenses and objections — when and how presented — by pleading or motion — motion for judgment on pleadings

Rule 12(a). When presented. Except as otherwise provided by statute applicable to particular defendants or proceedings, the responsive pleadings shall be served as follows: A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, or within 20 days after the completion of service of process as provided in Rule 4, unless the court directs otherwise when service of process is made pursuant to Rule 4D(4). A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer, or, if a reply is ordered by the court, within 20 days after service of the order or such time as the order otherwise directs. Unless a different time is fixed by the court, when a motion permitted by these rules is served, the responsive pleading shall be served within 20 days after notice of the court's action if the court denies the motion or postpones its disposition until trial on the merits, and shall be served within 20 days after the service of the more definite statement if the court grants a motion for a more definite statement.

History: En. Sec. 12, Ch. 13, L. 1961; amd Sec. 1, Ch. 89, L. 1963.

Rule 12(b). How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to the claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

(i) The cases in which place of trial may be changed are specified in section 25-2-201, Montana Code Annotated.

(ii) If the county designated in the complaint is not the proper county for trial of the action, the defendant must at the time of his first appearance request by motion that the trial be had in the proper county. Every defense in law or fact, to a claim for relief in any pleading which defendant desires to present by way of motion as hereinabove provided must be joined with, or inserted in, the motion requesting a change in the place of trial. If the court in which the action is commenced grants the request for change of venue, that court shall not consider nor pass upon other defenses in law, or fact, presented by the motion, but such shall be considered and decided by e court sitting in the proper county after the transfer has been completed. o request for change of venue is waived by being joined in a motion with her defenses or objections in law or fact.

(iii) Any request for change in place of trial for grounds 2 and 3 of section -2-201, Montana Code Annotated, must be presented by motion within 20 ays after the answer to the complaint, or to the cross-claim where a cross-aim is filed, or the reply to any answer, in those cases in which a reply is uthorized, has been filed; except that whenever at some time more than 20 ays after the last pleading has been filed an event occurs which thereafter ffords good cause to believe that an impartial trial cannot be had under round 2 of said section 25-2-201, and competent proof is submitted to the ourt that such cause of impartiality did not exist within the 20-day period fter the last pleading was filed, then the court may entertain a motion to hange the place of trial under ground 2 of section 25-2-201 within 20 days fter that later event occurs.

(iv) With respect to [ground 4 of section 93-2906, R.C.M. 1947], the party ho disqualifies a district judge, and who desires a change of venue, must nclude such request in a motion filed along with the affidavit of disqualification. If the party who does not disqualify the district judge desires a change f venue, he shall make such request by motion within 5 days after being erved with a copy of the affidavit of disqualification. Unless the parties have greed in writing upon another district judge, or upon a member of the bar s judge pro tempore, the disqualified district judge must either call in nother district judge within 15 days after filing of the affidavit of disqualifiation, or 10 days after filing of the motion for change of venue, or, if no ther judge is called in, grant the motion for change of venue. If any other ualified district judge shall be called in, as herein provided, and shall, vithin 30 days after the motion for change of venue has been filed, appear nd assume jurisdiction of the cause and of all matters and proceedings herein, no change of the place of trial shall be made. If the other qualified listrict judge called in, as herein provided, fails to appear and assume jurisliction within 30 days after the motion for change of venue has been filed, hen the disqualified judge must immediately grant the motion and order a hange in the place of trial to some other county.

History: **En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750, pr. 1, 1965, eff. July 1, 1965; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.**

Rule 12(c). Motion for judgment on the pleadings. After the leadings are closed but within such time as not to delay the trial, any party nay move for judgment on the pleadings. If, on a motion for judgment on he pleadings, matters outside the pleadings are presented to and not xcluded by the court, the motion shall be treated as one for summary judgnent and disposed of as provided in Rule 56, and all parties shall be given easonable opportunity to present all material made pertinent to such a notion by Rule 56.

History: **En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963.**

Rule 12(d). Preliminary hearings. The defenses specifically enumerated (1) [to] (7) in subdivision (b) of this rule whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until trial.

History: En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 12(e). Motion for more definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

History: En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963.

Rule 12(f). Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

History: En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963.

Rule 12(g). Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

History: En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 12(h). Waiver or preservation of certain defenses. (1) A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

History: En. Sec. 12, Ch. 13, L. 1961; amd. Sec. 1, Ch. 89, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 13. Counterclaim and cross-claim

Rule 13(a). Compulsory counterclaims. A pleading shall state as a ounterclaim any claim which at the time of serving the pleading the pleader as against any opposing party, if it arises out of the transaction or occurence that is the subject matter of the opposing party's claim and does not equire for its adjudication the presence of third parties of whom the court annot acquire jurisdiction, except that such claim need not be so stated if the time the action was commenced the claim was the subject of another ending action.

History: **En. Sec. 13, Ch. 13, L. 1961.**

Rule 13(b). Permissive counterclaims. A pleading may state as a ounterclaim any claim against an opposing party not arising out of the ansaction or occurrence that is the subject matter of the opposing party's aim.

History: **En. Sec. 13, Ch. 13, L. 1961.**

Rule 13(c). Counterclaim exceeding opposing claim. A counteraim may or may not diminish or defeat the recovery sought by the opposg party. It may claim relief exceeding in amount or different in kind from at sought in the pleading of the opposing party.

History: **En. Sec. 13, Ch. 13, L. 1961.**

Rule 13(d). Counterclaim against the state. These rules shall not e construed to enlarge beyond the limits now fixed by law the right to ssert counterclaims or to claim credits against the state of Montana or any f its governmental subdivisions, agencies or officers.

History: **En. Sec. 13, Ch. 13, L. 1961.**

Rule 13(e). Counterclaim maturing or acquired after pleading. claim which either matured or was acquired by the pleader after serving is pleading may, with the permission of the court, be presented as a counerclaim by supplemental pleading.

History: **En. Sec. 13, Ch. 13, L. 1961.**

Rule 13(f). Omitted counterclaim. When a pleader fails to set up a ounterclaim through oversight, inadvertence, or excusable neglect, or when ustice requires, he may by leave of court set up the counterclaim by amendent.

History: **En. Sec. 13, Ch. 13, L. 1961.**

Rule 13(g). Cross-claim against coparty. A pleading may state as cross-claim any claim by one party against a coparty arising out of the ransaction or occurrence that is the subject matter either of the original ction or of a counterclaim therein or relating to any property that is the ubject matter of the original action. Such cross-claim may include a claim hat the party against whom it is asserted is or may be liable to the crosslaimant for all or part of a claim asserted in the action against the crosslaimant.

History: **En. Sec. 13, Ch. 13, L. 1961.**

Rule 13(h). Joinder of additional parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

History: En. Sec. 13, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 13(i). Separate trials — separate judgment. If the court orders separate trials as provided in Rule 42(b), judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54(b), even if the claims of the opposing party have been dismissed or otherwise disposed of.

History: En. Sec. 13, Ch. 13, L. 1961.

Rule 14. Third-party practice

Rule 14(a). When defendant may bring in third party. At any time after commencement of the action a defendant as a third-party plaintiff may cause to be served a summons and complaint upon a person not a party to the action who is or may be liable to such third-party plaintiff for all or part of the plaintiff's claim against him. The person so served, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move for severance, separate trial, or dismissal of the third-party claim; the court may direct a final judgment upon either the original claim or the third-party claim alone in accordance with the provisions of Rule 54(b). A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

History: En. Sec. 14, Ch. 13, L. 1961.

Rule 14(b). When plaintiff may bring in third party. When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

History: En. Sec. 14, Ch. 13, L. 1961.

Rule 15. Amended and supplemental pleadings

Rule 15(a). Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the eading is one to which no responsive pleading is permitted and the action s not been placed upon the trial calendar, he may so amend it at any time thin 20 days after it is served. Otherwise a party may amend his pleading ly by leave of court or by written consent of the adverse party; and leave all be freely given when justice so requires. A party shall plead in response an amended pleading within the time remaining for response to the orig-al pleading or within 10 days after service of the amended pleading, which-er period may be the longer, unless the court otherwise orders.

History: **En. Sec. 15, Ch. 13, L. 1961.**

Rule 15(b). Amendments to conform to the evidence. When sues not raised by the pleadings are tried by express or implied consent of e parties, they shall be treated in all respects as if they had been raised the pleadings. Such amendment of the pleadings as may be necessary to use them to conform to the evidence and to raise these issues may be made on motion of any party at any time, even after judgment; but failure to amend does not affect the result of the trial of these issues. If evidence objected to at the trial on the ground that it is not within the issues made the pleadings, the court may allow the pleadings to be amended and shall so freely when the presentation of the merits of the action will be sub-rved thereby and the objecting party fails to satisfy the court that the mission of such evidence would prejudice him in maintaining his action or efense upon the merits. The court may grant a continuance to enable the jecting party to meet such evidence.

History: **En. Sec. 15, Ch. 13, L. 1961.**

Rule 15(c). Relation back of amendments. Whenever the claim or efense asserted in the amended pleading arose out of the conduct, trans-tion, or occurrence set forth or attempted to be set forth in the original eading, the amendment relates back to the date of the original pleading. n amendment changing the party against whom a claim is asserted relates ack if the foregoing provision is satisfied and, within the period provided by w for commencing the action against him, the party to be brought in by nendment (1) has received such notice of the institution of the action that e will not be prejudiced in maintaining his defense on the merits, and (2) new or should have known that, but for a mistake concerning the identity the proper party, the action would have been brought against him.

The requirements of clauses (1) and (2) hereof are satisfied with respect any city, village, town, school district, county, or public agency, board or ficer of such public bodies, and with respect to the state or any state board, gency or officer thereof, to be brought into the action as defendant, if pro-ss is served as provided by Rule 4D(2)(g) and (h) for service upon such efendant.

History: **En. Sec. 15, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 68.**

Rule 15(d). Supplemental pleadings. Upon motion of a party the ourt may, upon reasonable notice and upon such terms as are just, permit im to serve a supplemental pleading setting forth transactions or ccurrences or events which have happened since the date of the pleading ught to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

History: **En. Sec. 15, Ch. 13, L. 1961.**

Rule 16. Pretrial procedure — formulating issues. In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pretrial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to nonjury actions or extend it to all actions.

History: **En. Sec. 16, Ch. 13, L. 1961.**

IV. Parties

Rule 17. Parties plaintiff and defendant — capacity

Rule 17(a). Real party in interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the state of Montana so provides, an action for the use or benefit of another shall be brought in the name of the state of Montana. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

History: **En. Sec. 17, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.**

Rule 17(b). Capacity to sue or be sued. The capacity of persons to sue or be sued shall be determined by appropriate statutory provisions.

History: **En. Sec. 17, Ch. 13, L. 1961.**

Rule 17(c). Infants or incompetent persons. Whenever an infant r incompetent person has a representative, such as a general guardian, or ther like fiduciary, the representative may sue or defend on behalf of the nfant or incompetent person. If an infant or incompetent person does not ave a duly appointed representative he may sue by his next friend or by a uardian ad litem. The court shall appoint a guardian ad litem for an infant r incompetent person not otherwise represented in an action or shall make uch other order as it deems proper for the protection of the infant or incompetent person, or in any case where the court deems it expedient a guardian d litem may be appointed to represent an infant or incompetent person, ven though the infant or incompetent person may have a general guardian nd may have appeared by him.

History: **En. Sec. 17, Ch. 13, L. 1961.**

Rule 18. Joinder of claims and remedies

Rule 18(a). Joinder of claims. A party asserting a claim to relief as n original claim, counterclaim, cross-claim, or third-party claim, may join, ither as independent or as alternate claims, as many claims either legal or quitable or both as he has against an opposing party or coparty.

History: **En. Sec. 18, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.**

Rule 18(b). Joinder of remedies — fraudulent conveyances. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single ction; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may tate a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money. This rule shall not be applied in tort cases so as to permit the joinder of a liability or indemnity insurance carrier, unless such carrier s by law or contract directly liable to the person injured or damaged.

History: **En. Sec. 18, Ch. 13, L. 1961.**

Rule 19. Joinder of persons needed for just adjudication

Rule 19(a). Persons to be joined if feasible. A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or 2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

History: En. Sec. 19, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 19(b). Determination by court of whenever joinder not feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

History: En. Sec. 19, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 19(c). Pleading reasons for nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in subdivision (a)(1)-(2) hereof who are not joined, and the reasons why they are not joined.

History: En. Sec. 19, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 19(d). Exception of class actions. This rule is subject to the provisions of Rule 23.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 20. Permissive joinder of parties

Rule 20(a). Permissive joinder. All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

History: En. Sec. 20, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 20(b). Separate trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no aim against him, and may order separate trials or make other orders to pre- ent delay or prejudice.

History: En. Sec. 20, Ch. 13, L. 1961.

Rule 21. Misjoinder and nonjoinder of parties. Misjoinder of par- es is not ground for dismissal of an action. Parties may be dropped or dded by order of the court on motion of any party or of its own initiative t any stage of the action and on such terms as are just. Any claim against party may be severed and proceeded with separately.

History: En. Sec. 21, Ch. 13, L. 1961.

Rule 22. Interpleader

Rule 22(a). By joinder, cross-claim or counterclaim. Persons aving claims against the plaintiff may be joined as defendants and required interplead when their claims are such that the plaintiff is or may be xposed to double or multiple liability. It is not ground for objection to the inder that the claims of the several claimants or the titles on which their laims depend do not have a common origin or are not identical but are dverse to and independent of one another, or that the plaintiff avers that e is not liable in whole or in part to any or all of the claimants. A defendant xposed to similar liability may obtain such interpleader by way of cross- laim or counterclaim. The provisions of this rule supplement and do not in ny way limit the joinder of parties permitted in Rule 20.

History: En. Sec. 22, Ch. 13, L. 1961.

Rule 22(b). By substitution. A defendant against whom an action is ending upon a contract, or for specific real or personal property, at any time efore answer, upon affidavit that a person not a party to the action and ithout collusion with him makes against him a demand for the same debt r property, upon due notice to such person and the adverse party, may pply to the court for an order to substitute such person in his place and to ischarge him from liability to either party on his depositing in court the mount of the debt, or delivering the property or its value to such person as he court may direct, and the court, in its discretion, may make the order.

History: En. Sec. 22, Ch. 13, L. 1961.

Rule 23. Class actions

Rule 23(a). Prerequisites to a class action. One or more members f a class may sue or be sued as representative parties on behalf of all only f (1) the class is so numerous that joinder of all members is impracticable, 2) there are questions of law or fact common to the class, (3) the claims or efenses of the representative parties are typical of the claims or defenses of he class, and (4) the representative parties will fairly and adequately protect he interests of the class.

History: En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 968.

Rule 23(b). Class actions maintainable. An action may be main- ained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

History: En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 23(c). Determination by order whether class action to be maintained — notice — judgment — actions conducted partially as class actions. (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided

to subclasses and each subclass treated as a class, and the provisions of this le shall then be construed and applied accordingly.

History: **En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 68.**

Rule 23(d). Order in conduct of actions. In the conduct of actions which this rule applies, the court may make appropriate orders: (1) deter- ining the course of proceedings or prescribing measures to prevent undue petition or complication in the presentation of evidence or argument; (2) quiring, for the protection of the members of the class or otherwise for the ir conduct of the action, that notice be given in such manner as the court ay direct to some or all of the members of any step in the action, or of e proposed extent of the judgment, or of the opportunity of members to gnify whether they consider the representation fair and adequate, to inter- ene and present claims or defenses, or otherwise to come into the action; (3) nposing conditions on the representative parties or on intervenors; (4) quiring that the pleadings be amended to eliminate therefrom allegations s to representation of absent persons, and that the action proceed accord- gly; (5) dealing with similar procedural matters. The orders may be com- ined with an order under Rule 16, and may be altered or amended as may e desirable from time to time.

History: **En. Sec. 23, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 68.**

Rule 23(e). Dismissal or compromise. A class action shall not be ismissed or compromised without the approval of the court, and notice of e proposed dismissal or compromise shall be given to all members of the lass in such manner as the court directs.

History: **En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.**

Rule 23(f). Security for costs. Security for costs and charges, which ay be awarded against a representative party, may be required by an pposing party. When required, all proceedings in the action must be stayed ntil an undertaking, executed by two or more persons, is filed with the lerk, to the effect that they will pay such costs and charges as may be warded against the representative party by judgment, or in the progress of he action, not exceeding the sum of $1,000. A new or an additional under- aking may be ordered by the court or judge, upon proof that the original ndertaking is insufficient security, and proceedings in the action stayed ntil such new or additional undertaking is executed and filed.

History: **En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.**

Rule 23.1. Derivative actions by shareholders. In a derivative ction brought by one or more shareholders or members to enforce a right f a corporation or of an unincorporated association, the corporation or asso- iation having failed to enforce a right which may properly be asserted by t, the complaint shall allege with particularity the efforts, if any, made by he plaintiff to obtain the action he desires from the directors or comparable uthority and, if necessary, from the shareholders or members, and the easons for his failure to obtain the action or for not making the effort. The erivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or associatio The action shall not be dismissed or compromised without the approval o the court, and notice of the proposed dismissal or compromise shall be give to shareholders or members in such manner as the court directs.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 23.2. Actions relating to unincorporated associations. A action brought by or against the members of an unincorporated associatio as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In th conduct of the action the court may make appropriate orders correspondin with those described in Rule 23(d), and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23(e).

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 24. Intervention

Rule 24(a). Intervention of right. Upon timely application anyon shall be permitted to intervene in an action: (1) when a statute confers a unconditional right to intervene; or (2) when the applicant claims an interes relating to the property or transaction which is the subject of the action an he is so situated that the disposition of the action may as a practical matte impair or impede his ability to protect that interest, unless the applicant' interest is adequately represented by existing parties.

History: En. Sec. 24, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1 1968.

Rule 24(b). Permissive intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confer a conditional right to intervene; or (2) when an applicant's claim or defens and the main action have a question of law or fact in common. When a part to an action relies for ground of claim or defense upon any statute or executive order administered by a state governmental officer or agency or upo any regulation, order, requirement, or agreement issued or made pursuant t the statute or executive order, the officer or agency upon timely applicatio may be permitted to intervene in the action. In exercising its discretion th court shall consider whether the intervention will unduly delay or prejudic the adjudication of the rights of the original parties.

History: En. Sec. 24, Ch. 13, L. 1961.

Rule 24(c). Procedure. A person desiring to intervene shall serve motion to intervene upon the parties as provided in Rule 5. The motion shal state the grounds therefor and shall be accompanied by a pleading settin forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene. When th constitutionality of an act of the legislative assembly affecting the publi interest is drawn in question in any action to which neither the state nor an agency or officer thereof is a party, the court shall notify the attorney genera of the state and the attorney general may within 20 days thereafter intervene in the same manner on behalf of the state.

History: En. Sec. 24, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 25. Substitution of parties

Rule 25(a). Death. (1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by the successors or representatives of the deceased party or by any party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. If substitution is not made within a reasonable time, the action may be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(3) After a verdict is rendered or an order for judgment is made in any action, such action shall not abate by the death of any party, but the case shall proceed thereafter in the same manner as in cases where the cause of action survives by law, and substitution of parties shall be allowed as in other cases.

History: En. Sec. 25, Ch. 13, L. 1961.

Rule 25(b). Incompetency. If a party becomes incompetent, the court upon motion served as provided in subdivision (a) of this rule may allow the action to be continued by or against his guardian or may appoint a guardian ad litem for that purpose.

History: En. Sec. 25, Ch. 13, L. 1961.

Rule 25(c). Transfer of interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subdivision (a) of this rule.

History: En. Sec. 25, Ch. 13, L. 1961.

Rule 25(d). Substitution of successor to public officer. When an officer of the state, county, city, or other governmental agency, is a party to an action and during its pendency dies, resigns, or otherwise ceases to hold office, the action may be continued and maintained by or against his successor, if it is satisfactorily shown to the court that there is a substantial need for so continuing and maintaining it. Substitution pursuant to this rule may be made when it is shown by supplemental pleading that the successor of an officer adopts or continues or threatens to adopt or continue the action of his predecessor in enforcing a law averred to be in violation of the constitution of the state. Before a substitution is made, the party or officer to be affected, unless expressly assenting thereto, shall be given reasonable notice of the application therefor and accorded an opportunity to object. If substitution is not made within a reasonable time, the action may be dismissed a to such public officer. When an officer of the class described herein may su or be sued in his official capacity, he may be described as a party by his official title and not by name, subject to the power of the court, upon motion or on its own initiative, to require his name to be added. Unless his name is so added, no formal order of substitution is necessary.

History: En. Sec. 25, Ch. 13, L. 1961.

V. Depositions and Discovery

Rule 26. General provisions governing discovery

Rule 26(a). Discovery methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things o permission to enter upon land or other property, for inspection and othe purposes; physical and mental examinations; and requests for admission Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.

History: En. Sec. 26, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31 1975, eff. March 1, 1976.

Rule 26(b). Scope of discovery. Unless otherwise limited by order o the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying or an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) Trial preparation: Materials. Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of

his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

History: En. Sec. 26, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 26(c). Protective orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

History: En. Sec. 26, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 26(d). Sequence and timing of discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

History: En. Sec. 26, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 26(e). Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

History: En. Sec. 26, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 27. Depositions before action or pending appeal

Rule 27(a). Before action. (1) Petition. A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any district court of the state of Montana may file a verified petition in the district court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that the petitioner expects to be a party to an action cognizable in a district court of the state of Montana but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and his interest therein, 3, the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it, 4, the names or a description of the persons he expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for an order described in the petition. At least 20 days before the date of hearing the notice shall be served in the manner provided in Rule 4, and for persons not personally served in the manner provided in Rule 4D, who do not appear, an attorney shall be appointed who shall represent them and cross-examine the deponent. If an expected adverse party is a minor or incompetent the provisions of Rule 17(c) apply.

(3) Order and examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) Use of deposition. If a deposition to perpetuate testimony is taken under these rules it may be used in any action involving the same subject matter subsequently brought in a district court of the state of Montana in accordance with the provisions of Rule 26(d).

History: En. Sec. 27, Ch. 13, L. 1961.

Rule 27(b). Pending appeal. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony ma make a motion in the district court for leave to take the depositions, upo the same notice and service thereof as if the action was pending in the district court. The motion shall show (1) the names and addresses of person to be examined and the substance of the testimony which he expects to elici from each; (2) the reasons for perpetuating their testimony. If the court find that the perpetuation of the testimony is proper to avoid a failure or dela of justice, it may make an order allowing the depositions to be taken an may make orders of the character provided for by Rules 34 and 35, an thereupon the depositions may be taken and used in the same manner an under the same conditions as are prescribed in these rules for deposition taken in actions pending in the district court.

History: En. Sec. 27, Ch. 13, L. 1961.

Rule 27(c). Perpetuation by petition. This rule does not limit th power of a court to entertain a proceeding to perpetuate testimony.

History: En. Sec. 27, Ch. 13, L. 1961.

Rule 28. Persons before whom depositions may be taken

Rule 28(a). Within the United States. Within the state of Montana depositions shall be taken before a person authorized by the laws of this state to administer oaths; without the state, but within the United States, or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before a person authorized to administer oaths by the laws of this state, the United States, or of the place where the examination is held; within or without the state of Montana, depositions may also be taken before a person appointed by the court in which the action is pending, which persons so appointed shall have the power to administer oaths and take testimony.

History: En. Sec. 28, Ch. 13, L. 1961.

Rule 28(b). In foreign countries. In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to letter rogatory. A commission or a letter rogatory shall be issued on application and notice, and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

History: En. Sec. 28, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 28(c). Disqualification for interest. No deposition shall be ken before a person who is a relative or employee or attorney or counsel any of the parties, or is a relative or employee of such attorney or counsel, is financially interested in the action.

History: **En. Sec. 28, Ch. 13, L. 1961.**

Rule 28(d). Depositions to be used in other states. Whenever the eposition of any person is to be taken in this state pursuant to the laws of nother state or the United States or of another country for use in proceedgs there, the district court of the county where the witness is to be served, pon proof that notice has been duly served, may issue, pursuant to Rule 5(d), the necessary subpoenas.

History: **En. Sec. 28, Ch. 13, L. 1961.**

Rule 28(e). Deposition to be taken in sister states and foreign ountries for use in this state. Whenever the deposition of any person to be taken in a sister state or a foreign country, or any other jurisdiction, oreign or domestic, for use in this state, pursuant either to notice or stipuation, the clerk or equivalent officer of any court having jurisdiction at the lace where the witness is to be served or the deposition taken, upon proof hat notice has been duly served for taking of the deposition or that the paries have stipulated to such taking, may issue the necessary subpoenas or quivalent court instruments to require such witness to attend for the taking f the deposition at the time and place in the sister state or foreign country, r any other jurisdiction, foreign or domestic, designated in the notice or tipulation.

History: **En. Sup. Ct. Ord. 10750-8, Sept. 10, 1968, eff. Jan. 1, 1969.**

Rule 29. Stipulations regarding discovery procedure. Unless the ourt orders otherwise, the parties may by written stipulation (1) provide hat depositions may be taken before any person, at any time or place, upon ny notice, and in any manner and when so taken may be used like other epositions, and (2) modify the procedures provided by these rules for other nethods of discovery.

History: **En. Sec. 29, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 976.**

Rule 30. Depositions upon oral examination

Rule 30(a). When depositions may be taken. After commencement f the action, any party may take the testimony of any person, including a arty, by deposition upon oral examination. Leave of court, granted with or vithout notice, must be obtained only if the plaintiff seeks to take a deposiion prior to the expiration of 30 days after service of the summons and comlaint upon any defendant or service made under Rule 4(c), except that leave s not required (1) if a defendant has served a notice of taking deposition or therwise sought discovery, or (2) if special notice is given as provided in ubdivision (b)(2) of this rule. The attendance of witnesses may be compelled y subpoena as provided in Rule 45. The deposition of a person confined in rison may be taken only by leave of court on such terms as the court precribes.

History: **En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 976.**

Rule 30(b). Notice of examination; general requirements - special notice — nonstenographic recording — production of documents and things — deposition of organization. (1) A party desirin to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shal state the time and place for taking the deposition and the name and addres of each person to be examined, if known, and, if the name is not known, general description sufficient to identify him or the particular class or grou to which he belongs. If a subpoena duces tecum is to be served on the perso to be examined, the designation of the materials to be produced as set fort in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go ou of the district where the action is pending and more than 100 miles from th place of trial, or is about to go out of the United States, or is bound on voyage to sea, and will be unavailable for examination unless his depositio is taken before expiration of the 30-day period, and (B) sets forth facts t support the statement. The plaintiff's attorney shall sign the notice, and hi signature constitutes a certification by him that to the best of his knowledge information, and belief the statement and supporting facts are true. Th sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subdivision (b)(2) he was unable through the exercise of diligence to obtain counse to represent him at the taking of the deposition, the deposition may not b used against him.

(3) The court may for cause shown enlarge or shorten the time for takin the deposition.

(4) The court may upon motion order that the testimony at a depositio be recorded by other than stenographic means, in which event the order shal designate the manner of recording, preserving, and filing the deposition, an may include other provisions to assure that the recorded testimony will b accurate and trustworthy. If the order is made, a party may nevertheles arrange to have a stenographic transcription made at his own expense.

(5) The notice to a party deponent may be accompanied by a reques made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shal apply to the request.

(6) A party may in his notice and in a subpoena name as the deponen a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on whic examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other person who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise nonparty organization of its duty to make such a designation. The person so designated shall testify as to matters known or reasonably available to th organization. This subdivision (b)(6) does not preclude taking a deposition b any other procedure authorized in these rules.

History: En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1 1976.

Rule 30(c). Examination and cross-examination — record of examination — oath — objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 43(b). The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subdivision (b)(4) of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

History: En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 30(d). Motion to terminate or limit examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

History: En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 30(e). Submission to witness — changes — signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

History: En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 30(f). Certification and filing by officer — exhibits — copies — notice of filing. (1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope endorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that (A) the person producing the materials may substitute copies to be marked for identification, if he affords to all parties fair opportunity to verify the copies by comparison with the originals, and (B) if the person producing the materials requests their return, the officer shall mark them, give each party an opportunity to inspect and copy them, and return them to the person producing them, and the materials may then be used in the same manner as if annexed to and returned with the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

History: En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 30(g). Failure to attend or to serve subpoena — expenses. (1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

History: En. Sec. 30, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 31. Depositions upon written questions

Rule 31(a). Serving questions — notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30(b)(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

History: En. Sec. 31, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 31(b). Officer to take responses and prepare record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 30(c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

History: En. Sec. 31, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 31(c). Notice of filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

History: En. Sec. 31, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 32. Use of depositions in court proceedings

Rule 32(a). Use of depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated

under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (A) that the witness is dead; or (B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (D) that the party offering the deposition has been unable to procure the notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action in any court of the United States or of any state has been dismissed and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor.

History: En. Sec. 32, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 32(b). Objections to admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

History: En. Sec. 32, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 32(c). Effect of taking or using depositions. A party does not make a person his own witness for any purpose by taking his deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but this shall not apply to the use by an adverse party of a deposition under subdivision (a)(2) of this rule. At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by him or by any other party.

History: En. Sec. 32, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 32(d). Effect of errors and irregularities in depositions. (1) As to notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to disqualification of officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to taking of deposition. (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to completion and return of deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

History: En. Sec. 32, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 33. Interrogatories to parties

Rule 33(a). Availability — procedures for use. Any party may serve upon any other party written interrogatories to be answered by the parties served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. A party serving interrogatories upon an adverse party shall file the same in the court in which the action is pending.

Each interrogatory shall be answered separately and fully in writing under oath unless it is objected to in which event the reasons for objection shall be stated in lieu of an answer. The party answering the interrogatories shall set forth a verbatim recopy of each of the interrogatories, followed by the answer thereto, and shall file the answers in the court in which the action is pending. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that defendant may serve answers or objections within 45 days after service of th summons and complaint upon that defendant. The court may allow a shorte or longer time. The party submitting the interrogatories may move for a order under Rule 37(a) with respect to any objection to or other failure t answer an interrogatory.

History: En. Sec. 33, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 196 amd. Sup. Ct. Ord. 10750, Nov. 28, 1966, eff. Jan. 1, 1967; amd. Sup. Ct. Ord. 10750, Dec. 31, 197 eff. March 1, 1976.

Rule 33(b). Scope — use at trial. Interrogatories may relate to an matters which can be inquired into under Rule 26(b), and the answers ma be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merel because an answer to the interrogatory involves an opinion or contention tha relates to fact or the application of law to fact, but the court may order tha such an interrogatory need not be answered until after designated discover has been completed or until a pretrial conference or other later time.

History: En. Sec. 33, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965 amd. Sup. Ct. Ord. 10750, Nov. 28, 1966, eff. Jan. 1, 1967; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975 eff. March 1, 1976.

Rule 33(c). Option to produce business records. Where the answer to an interrogatory may be derived or ascertained from the busines records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving o ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived o ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.

History: En. Sec. 33, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965 amd. Sup. Ct. Ord. 10750, Nov. 28, 1966, eff. Jan. 1, 1967; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975 eff. March 1, 1976.

Rule 34. Production of documents and things and entry upon land for inspection and other purposes

Rule 34(a). Scope. Any party may serve on any other party a request, (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the urpose of inspection and measuring, surveying, photographing, testing, or mpling the property or any designated object or operation thereon, within e scope of Rule 26(b).

History: En. Sec. 34, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 76.

Rule 34(b). Procedure. The request may, without leave of court, be rved upon the plaintiff after commencement of the action and upon any her party with or after service of the summons and complaint upon that arty. The request shall set forth the items to be inspected either by indi-dual item or by category, and describe each item and category with reason-ble particularity. The request shall specify a reasonable time, place, and anner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response ithin 30 days after the service of the request, except that a defendant may rve a response within 45 days after service of the summons and complaint pon that defendant. The court may allow a shorter or longer time. The sponse shall state, with respect to each item or category, that inspection nd related activities will be permitted as requested, unless the request is jected to, in which event the reasons for objection shall be stated. If objec-on is made to part of an item or category, the part shall be specified. The arty submitting the request may move for an order under Rule 37(a) with spect to any objection to or other failure to respond to the request or any art thereof, or any failure to permit inspection as requested.

History: En. Sec. 34, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 76.

Rule 34(c). Persons not parties. This rule does not preclude an ndependent action against a person not a party for production of documents nd things and permission to enter upon land.

History: En. Sec. 34, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 76.

Rule 35. Physical and mental examination of persons

Rule 35(a). Order for examination. When the mental or physical ondition (including the blood group) of a party, or of a person in the cus-ody or under the legal control of a party, is in controversy, the court in hich the action is pending may order the party to submit to a physical or ental examination by a physician or to produce for examination the person n his custody or legal control. The order may be made only on motion for ood cause shown and upon notice to the person to be examined and to all arties and shall specify the time, place, manner, conditions, and scope of the xamination and the person or persons by whom it is to be made.

History: En. Sec. 35, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 976.

Rule 35(b). Report of examining physician. (1) If requested by the arty against whom an order is made under Rule 35(a) or the person exam-ned, the party causing the examination to be made shall deliver to him a opy of a detailed written report of the examining physician setting out his indings, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that he is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a physician fails or refuses to make a report the court may exclude his testimony if offered at the trial, or may hold him in contempt of court, or both.

(2) Waiver of privilege. Either by (1) requesting and obtaining a report of the examination ordered as provided herein, or by taking the deposition of the examiner, or by (2) commencing an action or asserting a defense which places in issue the mental or physical condition of a party to the action, the party examined or a party to the action waives any privilege he may have in that action or any other action involving the same controversy, regarding the testimony of every person who has treated, prescribed, consulted, or examined or may thereafter treat, consult, prescribe or examine, such party in respect to the same mental or physical condition; but such waiver shall not apply to any treatment, consultation, prescription or examination for any mental or physical condition not related to the pending action. Upon motion seasonably made, and upon notice and for good cause shown, the court in which the action is pending, may make an order prohibiting the introduction in evidence of any such portion of the medical record of any person as may not be relevant to the issues in the pending action.

(3) This subdivision also applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of an examining physician or the taking of a deposition of the physician or the taking of a deposition of the physician in accordance with the provisions of any other rule.

History: En. Sec. 35, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-6, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 36. Requests for admissions

Rule 36(a). Request for admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action, only, of the truth of any matters within the scope of Rule 26(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answers shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(c), deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

History: En. Sec. 36, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 36(b). Effect of admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

History: En. Sec. 36, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 37. Failure to make discovery: sanctions

Rule 37(a). Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive or incomplete answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) Award of expenses of motion. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

History: En. Sec. 37, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 37(b). Failure to comply with order. (1) Sanctions by court in district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by court in which action is pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just and among others the following:

(A) An order that the matters regarding which the order was made or any ther designated facts shall be taken to be established for the purposes of the ction in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose esignated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further roceedings until the order is obeyed, or dismissing the action or proceeding r any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order reating as a contempt of court the failure to obey any orders except an order o submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) equiring him to produce another for examination, such orders as are listed n paragraphs (A), (B), and (C) of this subdivision, unless the party failing o comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall equire the party failing to obey the order or the attorney advising him or oth to pay the reasonable expenses, including attorney's fees, caused by the ailure, unless the court finds that the failure was substantially justified or hat other circumstances make an award of expenses unjust.

History: En. Sec. 37, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 975, eff. March 1, 1976.

Rule 37(c). Expenses on failure to admit. If a party fails to admit he genuineness of any document or the truth of any matter as requested nder Rule 36, and if the party requesting the admissions thereafter proves he genuineness of the document or the truth of the matter, he may apply o the court for an order requiring the other party to pay him the reasonable xpenses incurred in making that proof, including reasonable attorney's fees. he court shall make the order unless it finds that (1) the request was held bjectionable pursuant to Rule 36(a), or (2) the admission sought was of no ubstantial importance, or (3) the party failing to admit had reasonable round to believe that he might prevail on the matter, or (4) there was other ood reason for the failure to admit.

History: En. Sec. 37, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 975, eff. March 1, 1976.

Rule 37(d). Failure of party to attend at own deposition or erve answers to interrogatories or respond to request for inspecion. If a party or an officer, director, or managing agent of a party or a erson designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party ails (1) to appear before the officer who is to take his deposition, after being erved with a proper notice, or (2) to serve answers or objections to interogatories submitted under Rule 33, after proper service of the interrogaories, or (3) to serve a written response to a request for inspection submitted nder Rule 34, after proper service of the request, the court in which the ction is pending on motion may make such orders in regard to the failure s are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

History: En. Sec. 37, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

VI. Trials

Rule 38. Jury trial of right

Rule 38(a). Right reserved. The right of trial by jury as declared by The Constitution of the State of Montana or as given by a statute of the state of Montana shall be preserved to the parties inviolate.

History: En. Sec. 38, Ch. 13, L. 1961.

Rule 38(b). Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be endorsed upon a pleading of the party.

History: En. Sec. 38, Ch. 13, L. 1961.

Rule 38(c). [Demand] — specification of issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

History: En. Sec. 38, Ch. 13, L. 1961.

Rule 38(d). Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A waiver of trial by jury is not revoked by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

History: En. Sec. 38, Ch. 13, L. 1961.

Rule 39. Trial by jury or by the court

Rule 39(a). By jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the register of actions as a jury action. The trial of all issues so demanded shall be by jury, unless (1) the parties or their attorneys of record, by written stipulation filed with he court or by an oral stipulation made in open court and entered in the ecord, consent to trial by the court sitting without a jury or (2) the court pon motion or of its own initiative finds that a right of trial by jury of some r all of those issues does not exist.

History: **En. Sec. 39, Ch. 13, L. 1961.**

Rule 39(b). By the court. Issues not demanded for trial by jury as rovided in Rule 38 shall be tried by the court; but, notwithstanding the failre of a party to demand a jury in an action in which such a demand might ave been made of right, the court upon motion or of its own initiative may n 10 days' notice to the parties order a trial by a jury of any or all issues.

History: **En. Sec. 39, Ch. 13, L. 1961.**

Rule 39(c). Advisory jury and trial by consent. In all actions not riable of right by a jury the court upon motion or of its own initiative may ry any issue with an advisory jury or, the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

History: **En. Sec. 39, Ch. 13, L. 1961.**

Rule 40. Assignment of cases for trial. The district courts shall provide by rule for the placing of actions upon the trial calendar (1) without request of the parties or (2) upon request of a party and notice to the other parties or (3) in such other manner as the court deem expedient. Precedence shall be given to actions entitled thereto by any statute of the state of Montana.

History: **En. Sec. 40, Ch. 13, L. 1961.**

Rule 41. Dismissal of actions

Rule 41(a). Voluntary dismissal — effect thereof. (1) By plaintiff — by stipulation. Subject to the provisions of Rule 23(c), of Rule 66, and of any statute of the state of Montana, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, which ever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice.

(2) By order of court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

History: **En. Sec. 41, Ch. 13, L. 1961; amd. Sec. 1, Ch. 111, L. 1963.**

Rule 41(b). Involuntary dismissal — effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or failure to join a party under Rule 19, operates as an adjudication upon the merits.

History: En. Sec. 41, Ch. 13, L. 1961; amd. Sec. 1, Ch. 111, L. 1963; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 41(c). Dismissal of counterclaim, cross-claim, or third-party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim, or third-party claim. A voluntary dismissal by the claimant alone pursuant to paragraph (1) of subdivision (a) of this rule shall be made before a responsive pleading is served, or, if there is none, before the introduction of evidence at the trial or hearing.

History: En. Sec. 41, Ch. 13, L. 1961; amd. Sec. 1, Ch. 111, L. 1963.

Rule 41(d). Costs of previously-dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

History: En. Sec. 41, Ch. 13, L. 1961; amd. Sec. 1, Ch. 111, L. 1963.

Rule 41(e). Failure to serve summons. No action heretofore or hereafter commenced shall be further prosecuted as to any defendant who has not appeared in the action or been served in the action as herein provided within 3 years after the action has been commenced, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within 1 year, or unless summons issued within one year shall have been served and return made and filed with the clerk of the court within 3 years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said 3 years. When more than one defendant has been named in an action, the action may within the discretion of the trial court be further prosecuted against any defendant who has appeared within 3 years, or upon whom summons which has been issued within 1 year has been served and return made and filed with the clerk within 3 years as herein required.

History: En. Sec. 1, Ch. 111, L. 1963; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965.

Rule 42. Consolidation — separate trials

Rule 42(a). Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

History: En. Sec. 42, Ch. 13, L. 1961.

Rule 42(b). Separate trials. The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

History: En. Sec. 42, Ch. 13, L. 1961.

Rule 43. Evidence

Rule 43(b). Scope of examination and cross-examination. A party may interrogate any unwilling or hostile witness by leading questions. Either party, if he shall call as a witness in his behalf, the opposite party, an employee or agent of the opposite party, or an officer, director, employee or agent of a public or private corporation, or of a partnership or association which is an opposite party, or any person who at the time of the happening of the transaction out of which the suit or proceeding grew, was an employee or agent of the opposite party, or an officer, director, employee or agent of a public or private corporation, or of a partnership or association which is an opposite party, shall have the right to examine and cross-examine such witness the same as if he were called by the opposite party; and the answers of such witness shall not interfere with the right of such party to introduce evidence upon any issue involved in such suit or proceeding, and the party so calling and examining such witness shall not be bound to accept such answers as true. The witness thus called may be contradicted and impeached by or on behalf of the opposite party, as well as by or on behalf of the party calling the witness, and may be examined by the opposite party upon the subject matter of his examination in chief, but any such examination by the opposite party shall be under the rules of direct examination unless the witness is unwilling or hostile with reference to the opposite party, in which case, the court may, in its discretion, allow the witness to be cross-examined.

History: En. Sec. 43, Ch. 13, L. 1961.

Rule 43(c). Record of excluded evidence. In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.

History: En. Sec. 43, Ch. 13, L. 1961.

Rule 43(d). Affirmation in lieu of oath. Whenever under these rules an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

History: En. Sec. 43, Ch. 13, L. 1961.

Rule 43(e). Evidence on motions. Except as otherwise provided in Rule 56, when a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

History: En. Sec. 43, Ch. 13, L. 1961.

Rule 43(f). Interpreters. The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 44. Proof of official record

Rule 44(a). Authentication. (1) Domestic. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

History: En. Sec. 44, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 44(b). Lack of record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

History: En. Sec. 44, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 44(c). Other proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

History: En. Sec. 44, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 44.1. Determination of foreign law. A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 45. Subpoena

Rule 45(a). For attendance of witnesses — form — issuance. Every subpoena shall be issued by the clerk under the seal of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

History: En. Sec. 45, Ch. 13, L. 1961.

Rule 45(b). For production of documentary evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

History: En. Sec. 45, Ch. 13, L. 1961.

Rule 45(c). Service. A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service is made by exhibiting the original and delivering a true copy to the witness personally, giving or offering to him at the same time, if demanded by him, the fees to which he is entitled for travel to and from the place designated, and 1 day's attendance there. The service must be made so as to allow the witness a reasonable time for preparation and travel to the place of attendance.

History: En. Sec. 45, Ch. 13, L. 1961.

Rule 45(d). Subpoena for taking depositions — place of examinations. (1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance by the clerk of court where the action is pending, or for the district in which the deposition is to be taken of subpoenas for the persons named or described therein. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

The person to whom the subpoena is directed may, within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena may, if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) A resident of the state may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of the state may be required to attend in any county of the state wherein he is served with a subpoena or at any other convenient place as is fixed by order of court.

History: En. Sec. 45, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 45(e). Subpoena for a hearing or trial. At the request of any party subpoenas for attendance at a hearing or trial shall be issued as provided by Rule 45(a), and such subpoenas for a hearing or trial in a district court may be served at any place within the state.

History: En. Sec. 45, Ch. 13, L. 1961.

Rule 45(f). Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued.

History: En. Sec. 45, Ch. 13, L. 1961.

Rule 46. Exceptions unnecessary. Formal exceptions to rulings, orders, or findings of the court are unnecessary; but for all purposes it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or his objection to the action of the court and his grounds therefor; and, f a party has no opportunity to object to a ruling or order at the time it s made, the absence of an objection does not thereafter prejudice him.

History: En. Sec. 46, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Rule 47. Jurors

Rule 47(a). Examination of jurors. The court shall permit the paries or their attorneys to conduct the examination of prospective jurors under ts supervision. The court may supplement the examination by such further nquiry as it deems proper. Challenges for cause must be tried by the court. The juror challenged and any other person may be examined as a witness on he trial of the challenge.

History: En. Sec. 47, Ch. 13, L. 1961.

Rule 47(b). Manner of selection and order of examination of urors. From the entire jury panel, an initial panel of 20 jurors shall be called in the first instance, and before any voir dire examination of the jury shall be had. Examination of all jurors in the initial panel shall be completed by the plaintiff before examination by the defendant. If challenges for cause are allowed, an additional juror shall be called from the entire panel immediately upon the allowance of challenge, and the juror called to replace the uror excused for cause shall take the number of the juror who has been excused, to provide a full initial panel of 20 jurors, whose examination shall be completed before any peremptory challenges are made. When the voir dire examination has been completed, each side shall have four peremptory chalenges, and they shall be exercised by the plaintiff first striking one, the defendant than striking one, and so on, until each side has exhausted or waived its right. In event one or more alternate jurors are called, the next urors remaining in the initial panel, if any, shall be called by the clerk to be the alternate jurors. In event all jurors remaining of original initial panel of 20 jurors, including those substituted for those jurors excused for cause, have been subjected to peremptory challenge, then the clerk shall call additional jurors from the remainder of the jury panel to provide alternate jurors who will be subject to challenge as provided by law. In event there is more than one party defendant, and should it appear that each defendant is entitled to peremptory challenges, then the original panel shall be increased to provide four additional jurors for each defendant who is entitled to exercise peremptory challenges. The clerk shall keep a record of the order in which urors are called, and in event the entire initial panel has not been exhausted by challenges, the court shall excuse sufficient of the last called jurors until a jury of 12 persons and the determined number of alternates shall remain to make up the trial jury.

History: En. Sec. 47, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Rule 47(c). Alternate jurors. The court may direct that one or two urors in addition to the regular panel be called and impaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury arrives at its verdict, become unable or disqualified to perform their duties. An alternate juror shall not join the jury in its deliberation unless called upon by the court to replace a member of the jury. His conduct during the period in which the jury is considering its verdict shall be regulated by instructions of the trial court. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the principal jurors. An alternate juror who does not replace a principal juror shall be discharged after the jury arrives at its verdict. If one or two alternate jurors are called each party is entitled to one peremptory challenge in addition to those otherwise allowed by subdivision (b) of this rule. The additional peremptory challenge may be used only against an alternate juror, and the other peremptory challenges allowed by law shall not be used against the alternates.

History: En. Sec. 47, Ch. 13, L. 1961.

Rule 48. Juries — verdict. At least two-thirds in number of any jury may render a verdict or finding, and such verdict or finding so rendered shall have the same force and effect as if all such jury concurred therein. The parties may stipulate that the jury shall consist of less number than 12.

History: En. Sec. 48, Ch. 13, L. 1961.

Rule 49. Special verdicts and interrogatories

Rule 49(a). Special verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

History: En. Sec. 49, Ch. 13, L. 1961.

Rule 49(b). General verdict accompanied by answer to interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

History: En. Sec. 49, Ch. 13, L. 1961.

Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict

Rule 50(a). Motion for directed verdict — when made, effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

History: En. Sec. 50, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 50(b). Motion for judgment notwithstanding the verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after service of notice of entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Motions provided by this subdivision shall be heard and determined within the times provided by Rule 59 for the hearing and determination of motions for new trial.

History: En. Sec. 50, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Rule 50(c). Motion for judgment notwithstanding the verdict — conditional rulings on grant of motion. (1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the supreme court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the respondent on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the supreme court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after service of notice of entry of the judgment notwithstanding the verdict.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 50(d). Motion for judgment notwithstanding the verdict — denial of motion. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as respondent, assert grounds entitling him to a new trial in the event the supreme court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the supreme court reverses the judgment, nothing in this rule precludes it from determining that the respondent is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

History: En. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 51. Instructions to jury — objection. The court may, during the trial or at the close of the evidence, request each of the parties to submit proposed written instructions on the law of the case. No party may assign as error the failure to instruct on any point of law unless he offers an instruction thereon. The court shall rule upon the proposed instructions and may prepare other written instructions to be given of its own motion and shall submit to the parties the instructions that will be given and provide opportunity to make objections. Objections made shall specify and state the particular grounds on which the instruction is objected to and it shall not be sufficient in stating the ground of such objection to state generally the instruction does not state the law or is against the law, but such ground of objection shall specify particularly wherein the instruction is insufficient or does not state the law, or what particular clause therein is objected to. All objections and rulings thereon shall be made out of the presence of the jury. No exceptions are necessary to the rulings of the court on the giving or the refusal of instructions. The court shall read to the jury the instructions given before the arguments of counsel are commenced.

History: En. Sec. 51, Ch. 13, L. 1961.

Rule 52. Findings by the court

Rule 52(a). Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state

eparately its conclusions of law thereon, and judgment shall be entered pur-
uant to Rule 58; and in granting or refusing interlocutory injunctions the
ourt shall similarly set forth the findings of fact and conclusions of law
hich constitute the grounds of its action. Requests for findings are not
ecessary for purposes of review. Findings of fact shall not be set aside
nless clearly erroneous, and due regard shall be given to the opportunity of
he trial court to judge of the credibility of the witnesses. The findings of a
aster, to the extent that the court adopts them, shall be considered as the
ndings of the court. If an opinion or memorandum of decision is filed, it
ill be sufficient if the findings of fact and conclusions of law appear therein.
indings of fact and conclusions of law are unnecessary on decisions of
otions under Rules 12 or 56 or any other motion except as provided in Rule
1(b).

History: En. Sec. 52, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1,
969; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Rule 52(b). Amendment. Upon motion of a party made not later than
0 days after notice of entry of judgment the court may amend its findings
r make additional findings and may amend the judgment accordingly. The
otion may be made with a motion for a new trial pursuant to Rule 59.
Vhen findings of fact are made in actions tried by the court without a jury,
he question of the sufficiency of the evidence to support the findings may
hereafter be raised whether or not the party raising the question has made
n the district court an objection to such findings or has made a motion to
mend them or a motion for judgment.

History: En. Sec. 52, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Aug. 1, 1965, eff. Jan. 1, 1966;
md. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, May 21, 1969,
ff. July 1, 1969; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.

Rule 53. Masters

Rule 53(a). Appointment and compensation. Each district court
vith the concurrence of a majority of all the judges thereof may appoint one
r more standing masters for its district, and the court in which any action
s pending may appoint a special master therein. As used in these rules the
vord "master" includes a referee, an auditor, and an examiner. The compen-
ation to be allowed to a master shall be fixed by the court, and shall be
harged upon such of the parties or paid out of any fund or subject matter
f the action, which is in the custody and control of the court as the court
nay direct. The master shall not retain his report as security for his compen-
ation; but when the party ordered to pay the compensation allowed by the
ourt does not pay it after notice and within the time prescribed by the
ourt, the master is entitled to a writ of execution against the delinquent
arty.

History: En. Sec. 53, Ch. 13, L. 1961.

Rule 53(b). Reference. A reference to a master shall be the exception
nd not the rule. In actions to be tried by a jury, a reference shall be made
nly when the issues are complicated; in actions to be tried without a jury,
ave in matters of account, a reference shall be made only upon a showing
hat some exceptional condition requires it.

History: En. Sec. 53, Ch. 13, L. 1961.

Rule 53(c). Powers. The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 43(c) for a court sitting without a jury.

History: En. Sec. 53, Ch. 13, L. 1961.

Rule 53(d). Proceedings. (1) Meetings. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within 20 days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte, or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) Witnesses. The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, he may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) Statement of accounts. When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

History: En. Sec. 53, Ch. 13, L. 1961.

Rule 53(e). Report. (1) Contents and filing. The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set

em forth in the report. He shall file the report with the clerk of the court
d in an action to be tried without a jury, unless otherwise directed by the
der of reference, shall file with it a transcript of the proceedings and of the
idence and the original exhibits. The clerk shall forthwith mail to all par-
es notice of the filing.

(2) In nonjury actions. In an action to be tried without a jury the court
all accept the master's findings of fact unless clearly erroneous. Within 10
ays after being served with notice of the filing of the report any party may
rve written objections thereto upon the other parties. Application to the
urt for action upon the report and upon objections thereto shall be by
otion and upon notice as prescribed in Rule 6(d). The court after hearing
ay adopt the report or may modify it or may reject it in whole or in part
r may receive further evidence or may recommit it with instructions.

(3) In jury actions. In an action to be tried by a jury the master shall
ot be directed to report the evidence. His findings upon the issues submit-
d to him are admissible as evidence of the matters found and may be read
the jury, subject to the ruling of the court upon any objections in point
f law which may be made to the report.

(4) Stipulations as to findings. The effect of a master's report is the
ame whether or not the parties have consented to the reference; but, when
e parties stipulate that a master's findings of fact shall be final, only ques-
ons of law arising upon the report shall thereafter be considered.

(5) Draft report. Before filing his report a master may submit a draft
hereof to counsel for all parties for the purpose of receiving their sugges-
ions.

History: **En. Sec. 53, Ch. 13, L. 1961.**

VII. Judgment

Rule 54. Judgments — costs

Rule 54(a). Definition — form. A judgment is the final determina-
ion of the rights of the parties in an action or proceeding and as used in
hese rules includes a decree and any order from which an appeal lies. A
dgment shall not contain a recital of pleadings, the report of a master, or
he record of prior proceedings.

History: **En. Sec. 54, Ch. 13, L. 1961.**

**Rule 54(b). Judgment upon multiple claims or involving multi-
le parties.** When multiple claims for relief or multiple parties are involved
n an action, the court may direct the entry of a final judgment as to one
r more but fewer than all of the claims or parties only upon an express
etermination that there is no just reason for delay and upon an express
irection for the entry of judgment. In the absence of such determination
nd direction, any order or other form of decision, however designated, which
djudicates less than all the claims or the rights and liabilities of less than
ll the parties shall not terminate the action as to any of the claims or par-
ies, and the order or other form of decision is subject to revision at any time
efore the entry of judgment adjudicating all the claims and the rights and
iabilities of all the parties.

History: **En. Sec. 54, Ch. 13, L. 1961.**

Rule 54(c). Demand for judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

History: **En. Sec. 54, Ch. 13, L. 1961.**

Rule 54(d). Costs. Except when express provision therefor is made either in a statute of the state of Montana or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the state of Montana, its officers, agencies, and political subdivisions shall be imposed only to the extent permitted by law.

History: **En. Sec. 54, Ch. 13, L. 1961.**

Rule 55. Default

Rule 55(a). Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

History: **En. Sec. 55, Ch. 13, L. 1961.**

Rule 55(b). Judgment. Judgment by default may be entered as follows:

(1) By the clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person, and has been personally served, otherwise than by publication or personal service outside of this state.

(2) By the court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative, or guardian ad litem, who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the state of Montana.

History: **En. Sec. 55, Ch. 13, L. 1961; amd. Sup. Ct. Ord. June 1, 1964, eff. July 1, 1964.**

Rule 55(c). Default — setting aside — extension of time by court or stipulation of parties. For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b). No default of any party shall be entered, and no default judgment shall be entered against any party, except upon application of the opposing party. Before entering the default of any person who has been served outside the boundaries of the state of Montana, the court may, in its discretion, appoint a representative for any such person even though such person has not appeared. Any stipulation for extension of time between the parties or their counsel, whether in writing or made verbally before the court, shall be effective to extend the time for serving and/or filing any appearance, motion, pleading or proceeding, according to the terms of such stipulation. In any case if a party in default shall serve and file his appearance, motion, pleading or proceeding prior to application to the clerk for default, then such defaulting party shall not thereafter be considered in default as to that particular appearance, motion, pleading, or proceeding.

History: **En. Sec. 55, Ch. 13, L. 1961.**

Rule 55(d). Plaintiffs, counterclaimants, cross-claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).

History: **En. Sec. 55, Ch. 13, L. 1961.**

Rule 56. Summary judgment

Rule 56(a). For claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

History: **En. Sec. 56, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.**

Rule 56(b). For defending party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

History: **En. Sec. 56, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.**

Rule 56(c). Motion and proceedings thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

History: **En. Sec. 56, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Apr. 1, 1965, eff. July 1, 1965 repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.**

Rule 56(d). Case not fully adjudicated on motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

History: En. Sec. 56, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 56(e). Form of affidavits — further testimony — defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

History: En. Sec. 56, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 56(f). When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

History: En. Sec. 56, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 56(g). Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

History: En. Sec. 56, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 57. Declaratory judgments. The procedure for obtaining a declaratory judgment pursuant to Title 27, chapter 8, Montana Code Annotated, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39, subject to the provisions of section 27-8-302, Montana Code Annotated. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

History: **En. Sec. 57, Ch. 13, L. 1961.**

Rule 58. Entry of judgment. Unless the court otherwise directs and subject to the provisions of Rule 54(b), judgment upon the verdict of a jury shall be entered forthwith by the clerk; but the court shall direct the appropriate judgment to be entered upon a special verdict or upon a general verdict accompanied by answers to interrogatories returned by a jury pursuant to Rule 49. When the court directs that a party recover only money or costs or that all relief be denied, the clerk shall enter judgment forthwith upon receipt by him of the direction; but when the court directs entry of judgment for other relief, the judge shall promptly settle or approve the form of the judgment and direct that it be entered by the clerk. The entry of the judgment shall not be delayed for the taxing of costs.

History: **En. Sec. 58, Ch. 13, L. 1961.**

Rule 59. New trials — amendment of judgment

Rule 59(a). Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues for any of the reasons provided by the statutes of the state of Montana.

A motion for new trial shall state with particularity the grounds therefor, it not being sufficient merely to set forth the statutory grounds, but the motion may be amended, upon reasonable notice, up to and including the time of hearing the motion.

On motion for a new trial in an action tried without a jury, the court may take additional testimony, amend the findings of fact and conclusions of law or make new findings and conclusions, set aside, vacate, modify or confirm any judgment that may have been entered or direct the entry of a new judgment.

History: **En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.**

Rule 59(b). Time for motion. A motion for a new trial shall be served not later than 10 days after service of notice of the entry of the judgment.

History: **En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.**

Rule 59(c). Time for serving affidavits. When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which periods may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

History: **En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.**

Rule 59(d). Time for hearing on motion. Hearing on the motion shall be had within 10 days after it has been served, or within 10 days after the party opposing the motion for new trial has served his affidavits as set forth in subparagraph (c) hereinabove except that at any time after the notice of hearing on the motion has been served the court may issue an order continuing the hearing for not to exceed 30 days. In case the hearing is continued by the court, it shall be the duty of the court to hear the same at the earliest practicable date thereafter, and the court shall rule upon and decide the motion within 15 days after the same is submitted. If the court shall fail to rule upon the motion within said time, the motion shall, at the expiration of said period, be deemed denied.

The decision on the motion may be entered in the minutes of the court, or may be made in writing in chambers or in any county in the state where the judge may be, and be filed with the clerk of court in the county where the action is pending. Upon the hearing, reference may be had in all cases to the pleadings and the orders of the court on file, and reference may also be had to any depositions and documentary evidence offered on the trial, and to the proceedings on the trial and, when necessary, reference may be had to the notes of the court reporter.

If the motion is not noticed up for hearing and no hearing is held thereon, it shall be deemed denied as of the expiration of the period of time within which hearing is required to be held under this Rule 59.

History: En. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969.

Rule 59(e). On initiative of court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion.

History: En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969; amd. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 59(f). Order granting new trial. Any order of the court granting a new trial, shall specify the grounds therefor with sufficient particularity as to apprise the parties and the appellate court of the rationale underlying the ruling, and this may be done in the body of the order, or in an attached opinion.

History: En. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 59(g). Motion to alter or amend a judgment. A motion to alter or amend the judgment shall be served not later than 10 days after the service of the notice of the entry of the judgment, and may be combined with the motion for a new trial herein provided for. This motion shall be heard and determined within the time provided hereinabove with respect to a motion for a new trial.

History: En. Sec. 59, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Sept. 7 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-9, May 21, 1969, eff. July 1, 1969; amd. and redes. Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 60. Relief from judgment or order

Rule 60(a). Clerical mistakes. Clerical mistakes in judgments, orders other parts of the record, and in pleadings, and errors therein arising from versight or omission may be corrected by the court at any time of its own itiative or on the motion of any party and after such notice, if any, as the ourt orders.

History: **En. Sec. 60, Ch. 13, L. 1961.**

Rule 60(b). Mistakes — inadvertence — excusable neglect — ewly discovered evidence — fraud, etc. On motion and upon such erms as are just, the court may relieve a party or his legal representative om a final judgment, order, or proceeding for the following reasons: (1) misake, inadvertence, surprise, or excusable neglect; (2) newly discovered evience which by due diligence could not have been discovered in time to move or a new trial under Rule 59(b); (3) fraud (whether heretofore denominated ntrinsic or extrinsic), misrepresentation, or other misconduct of an adverse arty; (4) the judgment is void; (5) the judgment has been satisfied, released, r discharged, or a prior judgment upon which it is based has been reversed r otherwise vacated, or it is no longer equitable that the judgment should ave prospective application; or (6) any other reason justifying relief from e operation of the judgment. The motion shall be made within a reasonable me, and for reasons (1), (2), and (3) when a defendant has been personally erved, whether in lieu of publication or not, not more than 60 days after the dgment, order or proceeding was entered or taken, or, in a case where otice of entry of judgment is required by Rule 77(d), not more than 60 days fter service of notice of entry of judgment. When from any cause the sumons in an action has not been personally served on the defendant, the court ay allow, on such terms as may be just, such defendant or his legal repreentative, at any time within 180 days after the rendition of any judgment such action, to answer to the merits of the original action. A motion under his subdivision (b) does not affect the finality of a judgment or suspend its peration. This rule does not limit the power of a court to entertain an indeendent action to relieve a party from a judgment, order, or proceeding, or o grant relief to a defendant not actually personally notified as may be equired by law, or to set aside a judgment for fraud upon the court.

History: **En. Sec. 60, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750, Aug. 1, 1965, eff. Jan. 1, 1966; md. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.**

Rule 60(c). Time for hearing and determining motions. Motions rovided by subdivisions (a) and (b) of this rule shall be heard and deterined within the times provided by Rule 59 in the case of motions for new rials and amendment of judgment.

History: **En. Sup. Ct. Ord. 10750, Sept. 7, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-9, ay 21, 1969, eff. July 1, 1969.**

Rule 61. Harmless error. No error in either the admission or the xclusion of evidence and no error or defect in any ruling or order or in anyhing done or omitted by the court or by any of the parties is ground for ranting a new trial or for setting aside a verdict or for vacating, modifying r otherwise disturbing a judgment or order, unless refusal to take such ction appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

History: **En. Sec. 61, Ch. 13, L. 1961.**

Rule 62. Stay of proceedings to enforce a judgment

Rule 62(a). Superseded — M.R.App.Civ.P., Rule 7.

History: **En. Sec. 62, Ch. 13, L. 1961.**

Rule 62(b). Stay on motion for new trial or for judgment. In its discretion and on such conditions for the security of the adverse party as are proper, the district court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 59, or of a motion for relief from a judgment or order made pursuant to Rule 60, or of a motion for judgment in accordance with a motion for a directed verdict made pursuant to Rule 50, or of a motion for amendment to the findings or for additional findings made pursuant to Rule 52(b).

History: **En. Sec. 62, Ch. 13, L. 1961.**

Rule 62(c). Injunction pending appeal. When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the district court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

History: **En. Sec. 62, Ch. 13, L. 1961.**

Rule 62(d). Superseded — M.R.App.Civ.P., Rule 7.

History: **En. Sec. 62, Ch. 13, L. 1961.**

Rule 62(e). Stay in favor of the state of Montana or agency thereof. When an appeal is taken by the state of Montana or an officer or agency or governmental subdivision thereof, and the operation or enforcement of the judgment is stayed, no security shall be required from the appellant. In all cases, the parties may by written stipulation waive the filing of security.

History: **En. Sec. 62, Ch. 13, L. 1961.**

Rule 62(g). Power of appellate court not limited. The provisions in this rule do not limit any power of the supreme court of the state of Montana or of a justice thereof to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of the judgment subsequently to be entered.

History: **En. Sec. 62, Ch. 13, L. 1961.**

Rule 62(h). Stay of judgment upon multiple claims. When a court has ordered a final judgment on some but not all of the claims presented in the action under the conditions stated in Rule 54(b), the court may stay enforcement of that judgment until the entering of a subsequent judgment r judgments and may prescribe such conditions as are necessary to secure e benefit thereof to the party in whose favor the judgment is entered.

History: **En. Sec. 62, Ch. 13, L. 1961.**

VIII. Provisional and Final Remedies and Special Proceedings

Rule 64. Seizure of person or property. At the commencement of nd during the course of an action, all remedies providing for seizure of erson or property for the purpose of securing satisfaction of the judgment ltimately to be entered in the action are available under the circumstances nd in the manner provided by law.

History: **En. Sec. 63, Ch. 13, L. 1961.**

Rule 65. Injunctions. The procedure for granting restraining orders nd temporary and permanent injunctions shall be as provided by statute.

History: **En. Sec. 64, Ch. 13, L. 1961.**

Rule 66. Receivers. An action wherein a receiver has been appointed hall not be dismissed except by order of the court. The practice in the ppointment of and administration of estates by receivers or other similar fficers shall be in accordance with the Montana statutes and with the practice heretofore followed in the courts of this state. In all other respects, the ction in which the appointment of the receiver is sought or which is brought y or against a receiver is governed by these rules.

History: **En. Sec. 65, Ch. 13, L. 1961.**

Rule 67. Deposit in court. In an action in which any part of the relief ought is a judgment for a sum of money or the disposition of a sum of noney or the disposition of any other thing capable of delivery, a party, upon otice to every other party, and by leave of court, may deposit with the court ll or any part of such sum or thing. Money paid into court under this rule hall be deposited and withdrawn in accordance with the provisions of chaper 8, Title 25, Montana Code Annotated.

History: **En. Sec. 66, Ch. 13, L. 1961.**

Rule 68. Offer of judgment. At any time more than 10 days before he trial begins, a party defending against a claim may serve upon the dverse party an offer to allow judgment to be taken against him for the noney or property or to the effect specified in his offer, with costs then ccrued. If within 10 days after the service of the offer the adverse party erves written notice that the offer is accepted, either party may then file the ffer and notice of acceptance together with proof of service thereof and hereupon judgment shall be entered. An offer not accepted shall be deemed vithdrawn and evidence thereof is not admissible except in a proceeding to letermine costs. If the judgment finally obtained by the offeree is not more avorable than the offer, the offeree must pay the costs incurred after the naking of the offer. The fact that an offer is made but not accepted does ot preclude a subsequent offer. When the liability of one party to another as been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

History: En. Sec. 67, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 69. Execution. The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of and supplementary to execution shall be in accordance with the statutes of the state of Montana. In aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for taking depositions.

History: En. Sec. 68, Ch. 13, L. 1961.

Rule 70. Judgment for specific acts — vesting title. If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the court may order the clerk to issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

History: En. Sec. 69, Ch. 13, L. 1961.

Rule 71. Process in behalf of and against persons not parties. When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

History: En. Sec. 70, Ch. 13, L. 1961.

IX. Appeals

Rule 72. Appeal from a district court to the supreme court. When an appeal is permitted by law from a district court to the supreme court of Montana, or in any case where original proceedings are commenced in the supreme court, such appeal or original proceeding shall be taken, perfected, and prosecuted pursuant to the provisions of the Montana Rules of

Appellate Civil Procedure and controlling statutes to the extent that they are not superseded by the Montana Rules of Appellate Civil Procedure.

History: En. Sec. 71, Ch. 13, L. 1961; amd. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

X. District Courts and Clerks

Rule 77. District courts and clerks

Rule 77(a). District courts always open. The district courts shall be deemed always open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

History: En. Sec. 72, Ch. 13, L. 1961.

Rule 77(b). Trials and hearings — orders in chambers. All trials upon the merits shall be conducted in open court and so far as convenient in a regular courtroom. All other acts or proceedings may be done or conducted by a judge in chambers, without the attendance of the clerk or other court officials and at any place either within or without the district; but no hearing, other than one ex parte, shall be conducted outside the district without the consent of all parties affected thereby.

History: En. Sec. 72, Ch. 13, L. 1961.

Rule 77(c). Clerk's office and orders by clerk. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

History: En. Sec. 72, Ch. 13, L. 1961.

Rule 77(d). Notice of orders or judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order or judgment is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers.

History: En. Sec. 72, Ch. 13, L. 1961; repealed and replaced by Sup. Ct. Ord. 10750, Dec. 31, 1975, eff. March 1, 1976.

Rule 77(e). Transmittal of file on removal. Upon the filing of a copy of the petition for removal of any state district court action to the district court of the United States, district of Montana, and a request in writing therefor, the clerk of such state district court shall promptly deliver to the clerk of court of the district court of the United States, district of Montana, all papers then in the original state court file, or theretofore issued and subsequently filed and shall keep in the state court file only the copy of the petition for removal and such papers as were filed with the request for removal.

History: **En. Sup. Ct. Ord. 10750-8, Sept. 10, 1968, eff. Jan. 1, 1969; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972.**

Rule 80. Stenographer — stenographic report or transcript as evidence. Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

History: **En. Sec. 73, Ch. 13, L. 1961.**

XI. General Provisions

Rule 81. Applicability in general

Rule 81(a). Special statutory proceedings. The statutory proceedings listed in Table A and any other special statutory proceeding, whether or not listed in Table A, are excepted from these rules insofar as they are inconsistent or in conflict with the procedure and practice provided by these rules.

History: **En. Sec. 74, Ch. 13, L. 1961.**

Compiler's Comments

Table A. The Code Commissioner has not reprinted Table A in the MCA because it was never intended to be a complete listing, has not been updated since 1963, contains a high percentage of repealed sections, and is generally obsolete and not very useful. Interested persons may find it in the 1964 main volume of R.C.M. 1947, Vol. 7.

Rule 81(b). Appeals to district courts. These rules do not supersede the provisions of statutes relating to appeals to or review by the district courts, but shall govern procedure and practice relating thereto insofar as these rules are not inconsistent with such statutes.

History: **En. Sec. 74, Ch. 13, L. 1961.**

Rule 81(c). Rules incorporated into statutes. Where any statute heretofore or hereafter enacted, whether or not applicable to a special statutory proceeding or listed in any table appended hereto, provides that any act in a civil proceeding in a district court shall be done in the manner provided by law or as in a civil action or as provided by any statute superseded by these rules, such act shall be done in accordance with these rules and the procedure thereon shall conform to these rules, insofar as practicable.

History: **En. Sec. 74, Ch. 13, L. 1961.**

Rule 82. Jurisdiction and venue unaffected. Except as provided in Rule 4 these rules shall not be construed to extend or limit the jurisdiction of the district courts of Montana or the venue of actions therein.

History: **En. Sec. 75, Ch. 13, L. 1961.**

Rule 83. Rules by district courts. Each district court, upon agreement of the judges or a majority thereof, may from time to time make and amend rules governing its practice not inconsistent with these rules or other rules prescribed by the supreme court. Copies of rules and amendments so ade by any district court shall upon their promulgation be furnished to the preme court of this state. In all cases not provided for by rule, the district urts may regulate their practice in any manner not inconsistent with these les.

History: En. Sec. 76, Ch. 13, L. 1961.

Rule 84. Forms. The forms contained in the Appendix of Forms are fficient under the rules and are intended to indicate the simplicity and evity of statement which the rules contemplate.

History: En. Sec. 77, Ch. 13, L. 1961.

Rule 85. Title. These rules shall be known as the Montana Rules of vil Procedure and may be cited as M.R.Civ.P.

History: En. Sec. 78, Ch. 13, L. 1961.

Rule 86. Effective date — statutes superseded

Rule 86(a). Effective date and application to pending proceedgs. These rules became effective January 1, 1962. In accordance with hapter 16, Laws of 1963, proposed amendments to these rules shall be first epared by the advisory committee, which shall distribute copies thereof to e bench and resident bar of the state for their consideration and suggesons. Submission of proposed amendments to the court shall be made by the lvisory committee only after the advisory committee has considered suggesons received from the bench and bar. Submissions to the court shall be ticed by the court by mailing notice, containing copies of the submitted oposals to all district judges and resident attorneys licensed to practice in e Montana courts as shown by the records of the clerk of the court, and e court will receive written suggestions and objections within the time fixed the notice, which shall be not less than 90 days thereafter. Oral hearings n proposals will be held only on special order of the court. Amendments lopted by the court will become effective on January 1 unless a different me be fixed in the order.

The court will annually, at least 30 days prior to January 1, cause to be ublished all amendments to these rules which are to become effective on the ucceeding January 1, and transmit the same to all judges and resident lawers of the state. Such rules as are to become effective at times other than anuary 1 will be published and transmitted at least 30 days prior to their fective date. These rules and amendments govern all proceedings and ctions brought after they take effect, and also all further proceedings in ctions then pending, except to the extent that in the opinion of the district ourt their application in a particular action pending when the rules or mendments take effect would not be feasible, or would work injustice, in hich event the procedure existing at the time the action was brought pplies.

History: En. Sec. 79, Ch. 13, L. 1961; amd. Sup. Ct. Ord. June 1, 1964, eff. July 1, 1964.

Rule 86(b). Statutes superseded. Upon the taking effect of these ules or amendments thereto all statutes and parts of statutes in conflict therewith and the statutes listed in Tables B and C are superseded in respec of practice and procedure in the district courts.

History: En. Sec. 79, Ch. 13, L. 1961; amd. Sup. Ct. Ord. June 1, 1964, eff. July 1, 1964.

Compiler's Comments

Tables B and C. Tables B and C will be published in the separate annotations volume which will be available early in 1980. They can also b found in Vol. 7, R.C.M. 1947, in the 1964 mai volume updated by the 1977 supplement.

Appendix of Forms

Form 1. SUMMONS—OFFICIAL FORM

IN THE DISTRICT COURT OF THE ...... JUDICIAL DISTRICT
OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF ....

A.B., Plaintiff
vs. SUMMONS
C.D., Defendant

The State of Montana to the above-named defendant:

You are hereby summoned to answer the complaint in this action which i filed in the office of the clerk of this court, a copy of which is herewit served upon you, and to file your answer and serve a copy thereof upon th plaintiff's attorney within 20 days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in th complaint.

Witness my hand and the seal of said court, this .... day of.....

E.F.
Attorney for Plaintiff,
..........................(Address)
..........................Montana.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 2. COMPLAINT ON A PROMISSORY NOTE

1. Defendant on or about June 1, 1958, executed and delivered to plaintif a promissory note [in the following words and figures: (here set out the not verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereb defendant promised to pay to plaintiff or order on June 1, 1959, the sum o .... dollars with interest thereon at the rate of .... per cent per annum].[1]

> [1] The pleader may use the material in one of the three sets of brackets This choice will depend upon whether he desires to plead the documen verbatim, or by exhibit, or according to its legal effect.

2. Defendant owes to plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of ... dollars, interest, and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 3. COMPLAINT ON AN ACCOUNT

Defendant owes plaintiff .... dollars according to the account heret annexed as Exhibit A.

Wherefore plaintiff demands judgment against defendant for the sum of .... llars, interest, and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 4. COMPLAINT FOR GOODS SOLD AND DELIVERED

Defendant owes plaintiff .... dollars for goods sold and delivered by plain- f to defendant between June 1, 1959, and December 1, 1959.

Wherefore plaintiff demands judgment against defendant for the sum of .... llars, interest, and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 5. COMPLAINT FOR MONEY LENT

Defendant owes plaintiff .... dollars for money lent by plaintiff to defen- nt on June 1, 1959, which is now due.

Wherefore plaintiff demands judgment against defendant for the sum of .... llars, interest, and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 6. COMPLAINT FOR MONEY PAID BY MISTAKE

Defendant owes plaintiff .... dollars for money paid by plaintiff to defen- nt by mistake on June 1, 1959, under the following circumstances; (stating e circumstances with particularity. See Rule 9(b)).

Wherefore plaintiff demands judgment against defendant for the sum of .... llars, interest, and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 7. COMPLAINT FOR MONEY HAD AND RECEIVED

Defendant owes plaintiff $10,000 for money had and received from one H. on June 1, 1959, to be paid by defendant to plaintiff.

Wherefore plaintiff demands judgment against defendant for the sum of 0,000, interest, and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 8. COMPLAINT FOR NEGLIGENCE

1. On June 1, 1959, in a public highway called State Street, in Helena, ontana, defendant negligently drove a motor vehicle against the plaintiff ho was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was herwise injured, was prevented from transacting his business, suffered great in of body and mind, and incurred expenses for medical attention and spitalization in the sum of .... dollars.

Wherefore plaintiff demands judgment against defendant in the sum of .... llars and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 9. COMPLAINT FOR NEGLIGENCE WHERE PLAINTIFF IS UNABLE TO DETERMINE DEFINITELY WHETHER THE PERSON RESPONSIBLE IS C.D. or E.F. OR WHETHER BOTH ARE RESPONSIBLE AND WHERE HIS EVIDENCE MAY JUSTIFY A FINDING OF WILLFULNESS OR OF RECKLESSNESS OR OF NEGLIGENCE

1. On June 1, 1959, in a public highway called State Street in Helena, Montana, defendant C.D. or defendant E.F., or both defendants C.D. and E.F. willfully or recklessly or negligently drove or caused to be driven a motor vehicle against the plaintiff who was then crossing said highway.

2. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of .... dollars.

Wherefore plaintiff demands judgment against C.D. or against E.F. or against both in the sum of .... dollars and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 10. COMPLAINT FOR CONVERSION

On or about December 1, 1959, defendant converted to his own use ten bonds of the .... Company (inserting brief identification as by number and issue) of the value of .... dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of .... dollars, interest and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 11. COMPLAINT FOR SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY LAND

1. On or about December 1, 1958, plaintiff and defendant entered into an agreement in writing a copy of which is hereto annexed as Exhibit A.

2. In accord with the provisions of said agreement plaintiff tendered to defendant the purchase price and requested a conveyance of the land, but defendant refused to accept the tender and refused to make the conveyance.

3. Plaintiff now offers to pay the purchase price.

Wherefore plaintiff demands (1) that defendant be required specifically to perform said agreement; (2) damages in the sum of .... dollars; (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of .... dollars; and (4) judgment for costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 12. COMPLAINT ON CLAIM FOR DEBT AND TO SET ASIDE FRAUDULENT CONVEYANCE UNDER RULE 18(b)

1. Defendant C.D. on or about June 1, 1958, executed and delivered to plaintiff a promissory note (setting forth the note verbatim, or in substance and legal effect, or by annexing a copy, as in Form 2).

2. Defendant C.D. owes to plaintiff the amount of said note and interest.

3. Defendant C.D. on or about December 1, 1958, conveyed all his prop- y, real and personal (or specify and describe) to defendant E.F. for the rpose of defrauding plaintiff and hindering and delaying the collection of indebtedness evidenced by the note above referred to.

Wherefore plaintiff demands judgment (1) against defendant C.D. for .... llars and interest; (2) that the aforesaid conveyance to defendant E.F. be clared void and the judgment herein be declared a lien on said property; for plaintiff's costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 13. COMPLAINT FOR NEGLIGENCE UNDER FEDERAL EMPLOYERS' LIABILITY ACT (45 U.S.C.A., 51-58)

1. During all the times herein mentioned defendant owned and operated interstate commerce a railroad which passed through a tunnel located at and known as Tunnel No. .....

2. On or about June 1, 1958, defendant was repairing and enlarging the nnel in order to protect interstate trains and passengers and freight from jury and in order to make the tunnel more conveniently usable for inter- ate commerce.

3. In the course of thus repairing and enlarging the tunnel on said day fendant employed plaintiff as one of its workmen, and negligently put aintiff to work in a portion of the tunnel which defendant had left unpro- cted and unsupported.

4. By reason of defendant's negligence in thus putting plaintiff to work that portion of the tunnel, plaintiff was, while so working pursuant to fendant's orders, struck and crushed by a rock, which fell from the nsupported portion of the tunnel, and was (describing plaintiff's injuries).

5. Prior to these injuries, plaintiff was a strong, able-bodied man, capable earning and actually earning .... dollars per day. By these injuries he has en made incapable of any gainful activity, has suffered great physical and ental pain, and has incurred expense in the amount of .... dollars for medi- ne, medical attendance and hospitalization.

Wherefore plaintiff demands judgment against defendant in the sum of .... llars and costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 14. COMPLAINT FOR INTERPLEADER AND DECLARATORY RELIEF

1. On or about June 1, 1956, plaintiff issued to G.H. a policy of life insur- nce whereby plaintiff promised to pay to K.L. as beneficiary the sum of ten ousand dollars upon the death of G.H. The policy required the payment G.H. of a stipulated premium on June 1, 1956, and annually thereafter a condition precedent to its continuance in force.

2. No part of the premium due June 1, 1956, was ever paid and the policy ased to have any force or effect on July 1, 1956.

3. Thereafter, on September 1, 1956, G.H. and K.L. died as the result of a collision between a locomotive and the automobile in which G.H. and K.L. were riding.

4. Defendant C.D. is the duly appointed and acting executor of the will of G.H.; defendant E.F. is the duly appointed and acting executor of the will of K.L.; defendant X.Y. claims to have been duly designated as beneficiary of said policy in place of K.L.

5. Each of defendants C.D., E.F., and X.Y. is claiming that the above-mentioned policy was in full force and effect at the time of the death of G.H.; each of them is claiming to be the only person entitled to receive payment of the amount of the policy and has made demand for payment thereof.

6. By reason of these conflicting claims of the defendants, plaintiff is in great doubt as to which defendant is entitled to be paid the amount of the policy, if it was in force at the death of G.H.

Wherefore plaintiff demands that the court adjudge:

(1) That none of the defendants is entitled to recover from plaintiff the amount of said policy or any part thereof.

(2) That each of the defendants be restrained from instituting any action against plaintiff for the recovery of the amount of said policy or any part thereof.

(3) That, if the court shall determine that said policy was in force at the death of G.H., the defendants be required to interplead and settle between themselves their rights to the money due under said policy, and that plaintiff be discharged from all liability in the premises except to the person whom the court shall adjudge entitled to the amount of said policy.

(4) That plaintiff recover its costs.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 15. MOTION TO DISMISS

The defendant moves the court as follows:

(1) To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

(2) To dismiss the action or in lieu thereof to quash the return of service of summons on the grounds: (Here state reasons, such as (a) that the defendant is a corporation organized under the laws of Delaware and was not and is not subject to service of process within the State of Montana; (b) that the defendant has not been properly served with process in this action, all of which more clearly appears in the affidavits of M.N. and X.Y. hereto annexed as Exhibit A and Exhibit B, respectively; (c) (etc.).)

....
Attorney for Defendant

....
Address

Notice of Motion

o: ...., Attorney for Plaintiff:

Please take notice, that the undersigned will bring the above motion for aring before this court at the courtroom thereof in the Courthouse at ...., ontana, on the .... day of ...., 19.., at .... o'clock ....M. or as soon thereafter counsel can be heard.

....
Attorney for Defendant
....
Address

History: **En. Sec. 80, Ch. 13, L. 1961.**

Form 16. ANSWER PRESENTING DEFENSES UNDER RULE 12(b)

FIRST DEFENSE

The complaint fails to state a claim against defendant upon which relief n be granted.

SECOND DEFENSE

If defendant is indebted to plaintiffs for the goods mentioned in the comlaint, he is indebted to them jointly with G.H. G.H. is alive; is a citizen and esident of the State of Montana; is subject to the jurisdiction of this court, s to both service of process and venue; can be made a party, but has not een made one.

THIRD DEFENSE

Defendant admits the allegation(s) contained in paragraph(s) .... of the omplaint; alleges that he is without knowledge or information sufficient to rm a belief as to the truth of the allegations contained in paragraph(s) .... f the complaint; and denies each and every other allegation contained in the omplaint.

FOURTH DEFENSE

The right of action set forth in the complaint did not accrue within .... ears next before the commencement of this action, and is therefore barred y the provisions of section (setting forth the particular section or subsection pplicable thereto).

COUNTERCLAIM

(Here set forth any claim as a counterclaim in the manner in which a claim s pleaded in a complaint.)

CROSS-CLAIM AGAINST DEFENDANT M.N.

(Here set forth the claim constituting a cross-claim against defendant M.N. n the manner in which a claim is pleaded in a complaint.)

History: **En. Sec. 80, Ch. 13, L. 1961.**

Form 17. ANSWER TO COMPLAINT SET FORTH IN FORM 7, WITH COUNTERCLAIM FOR INTERPLEADER

DEFENSE

Defendant denies the allegations of the complaint to the extent set forth in the counterclaim herein.

COUNTERCLAIM FOR INTERPLEADER

1. Defendant received the sum of ten thousand dollars as a deposit from E.F.

2. Plaintiff has demanded the payment of such deposit to him by virtue of an assignment of it which he claims to have received from E.F.

3. E.F. has notified the defendant that he claims such deposit, that the purported assignment is not valid, and that he holds the defendant responsible for the deposit.

Wherefore defendant demands:

(1) That the court order E.F. to be made a party defendant to respond to the complaint and to this counterclaim.

(2) That the court order the plaintiff and E.F. to interplead their respective claims.

(3) That the court adjudge whether the plaintiff or E.F. is entitled to the sum of money.

(4) That the court discharge defendant from all liability in the premises except to the person it shall adjudge entitled to the sum of money.

(5) That the court award to the defendant its costs and attorney's fees.

History: En. Sec. 80, Ch. 13, L. 1961.

Form 18. SUMMONS AND THIRD-PARTY COMPLAINT—INTERPLEADER

A.B., Plaintiff,
vs.
C.D., Defendant, and
Third-Party Plaintiff,
vs.
E.F., Third-Party Defendant.

THIRD-PARTY SUMMONS
Civil No.....

The State of Montana to the Above-Named Third-Party Defendant:

You are hereby summoned to answer the third-party complaint in this action which is filed in the office of the clerk of this court, a copy of which is herewith served upon you, and to file your answer and serve a copy thereof upon the plaintiff's attorney and upon the attorney for defendant and third-party plaintiff within 20 days after the service of this third-party summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the third-party complaint.

Witness my hand and the seal of said court, this .... day of .....

....
Clerk of the District Court

(COURT SEAL)

G.H.

Attorney for Defendant
and Third-Party Plaintiff

....
(Address)
................., Montana
The name and address of the
attorney for Plaintiff is:
J.K.

....
(Address)
................., Montana

A.B., Plaintiff,
vs.
C.D., Defendant, and
Third-Party Plaintiff,
vs.
E.F., Third-Party Defendant.

....
THIRD-PARTY
COMPLAINT
Civil No.....

1. Plaintiff A.B. has filed against defendant C.D., a complaint, a copy of which is hereto attached as Exhibit C.

2. (Here state the grounds upon which C.D. is entitled to recover from E.F., all or part of what A.B. may recover from C.D. The statement should be framed as in an original complaint.)

Wherefore C.D. demands judgment against third-party defendant E.F. for .... dollars and for costs.

....
Attorney for Third-Party Plaintiff

....
(Address)

History: En. Sec. 80, Ch. 13, L. 1961.

Form 19. MOTION TO INTERVENE AS A DEFENDANT UNDER RULE 24

A.B., Plaintiff,
vs.
C.D., Defendant,
E.F., Applicant for
Intervention

MOTION TO
INTERVENE
AS A
DEFENDANT
Civil No...

E.F. moves for leave to intervene as a defendant in this action, in order to assert the defenses set forth in his proposed answer, of which a copy is hereto attached, on the grounds (here set forth generally the grounds upon which intervention is sought, in accordance with the right of intervention contained in Rule 24) and as such as a defense to plaintiff's claim presenting (setting forth whether the same relates to questions of law or fact, or both) which are common to the main action.

....
Attorney for E.F., Applicant for Intervention
....
(Address)

NOTICE OF MOTION

(Contents the same as those in Form 15, or notice and motion may be combined in a notice of motion as provided in Rule 7(b).)

INTERVENER'S ANSWER

(Set forth defenses in accordance with the outline contained in Form 16)

History: En. Sec. 80, Ch. 13, L. 1961.

Form 20. MOTION FOR PRODUCTION, ETC., UNDER RULE 34

Plaintiff A.B. moves the court for an order requiring defendant C.D.:

(1) To produce and to permit plaintiff to inspect and to copy each of the following documents:

[Here list the documents and describe each of them]

(2) To produce and permit plaintiff to inspect and to photograph each of the following objects:

[Here list the objects and describe each of them]

(3) To permit plaintiff to enter [here describe property to be entered] and to inspect and to photograph [here describe the portion of the real property and the objects to be inspected and photographed].

Defendant C.D. has the possession, custody, or control of each of the foregoing documents and objects and of the above-mentioned real estate. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A hereto attached.

....
Attorney for Plaintiff
....
Address

....

EXHIBIT A

STATE OF MONTANA }
County of Lewis and Clark } SS

A.B., being first duly sworn says:

(1) (Here set forth all that plaintiff knows which shows that defendant as the papers or objects in his possession or control.)

(2) (Here set forth all that plaintiff knows which shows that each of the bove-mentioned items is relevant to some issue in the action.)

A.B. (Signed)

Jurat)

History: **En. Sec. 80, Ch. 13, L. 1961.**

Form 21. REQUEST FOR ADMISSION UNDER RULE 36

Plaintiff A.B. requests defendant C.D. within .... days after service of this equest to make the following admissions for the purpose of this action only nd subject to all pertinent objections to admissibility which may be interosed at the trial:

1. That each of the following documents, exhibited with this request, is enuine.

[Here list the documents and describe each document.]

2. That each of the following statements is true. [Here list the statenents.]

....

Attorney for Plaintiff

....

Address

History: **En. Sec. 80, Ch. 13, L. 1961.**

Form 22. ALLEGATION OF REASON FOR OMITTING NECESSARY PARTY

John Doe named in this complaint is not made a party to this action because he is not subject to the jurisdiction of this court]; or [for reasons tated].

History: **En. Sec. 80, Ch. 13, L. 1961.**

Form 23. SUPERSEDEAS BOND

We the undersigned jointly and severally acknowledge that we and our peronal representatives are jointly bound to pay to (respondent) the sum of .....

(Appellant) has appealed from that certain judgment (or order) (insert lescriptive facts) and has obtained an order staying execution from the disrict court, and the condition of this bond is that if the judgment (or order) ppealed from, or any part thereof, be affirmed, or the appeal dismissed, the ppellant will pay the amount directed to be paid by the judgment (or order) r the part of such amount as to which the judgment (or order) is affirmed, f affirmed only in part, and all damages and costs which may be awarded gainst the appellant upon the appeal. If such payment be made then this ond is void, otherwise to be and remain in full force and effect. If the appelant does not make such payment within thirty days after the filing of the remittitur from the supreme court in the court from which the appeal is taken, judgment may be entered on motion of the respondent in his favor against the sureties for such amount, together with the interest that may be due thereon, and the damages and costs which may be awarded against the appellant upon the appeal.

....
Appellant Address

....
Surety Address

....
Surety Address
(Justification of Sureties)
Form of bond approved.

....
Judge

(This form with necessary alterations may be used in any situation covered by Rule 62.)

History: **En. Sec. 80, Ch. 13, L. 1961 as added by Sec. 1, Ch. 3. L. 1963.**

CHAPTER 21

RULES OF APPELLATE CIVIL PROCEDURE

I. Applicability of Rules

Rule
1. Scope of rules — from what judgment or order an appeal may be taken.
2. What the court may review on an appeal from a judgment.
3. Suspension of the rules.

II. Appeals from Judgments and Orders of District Court

4. How taken.
5. Time for filing notice of appeal.
6. Undertaking for costs on appeal.
7. Stay of judgment or order pending appeal.
8. Sureties and their justification.
9. The record on appeal.
10. Transmission of the record.
11. Docketing the appeal — filing of the record.
12. Effect of dismissal.
13. Acts of executors, administrators or guardians valid when appointment vacated.
14. Ruling against respondent may be reviewed.
15. Remedial powers of the supreme court.
16. Remittitur must be certified to the clerk of the district court.

III. Original Proceedings—Extraordinary Writs

17. Acceptance and manner of conducting.

IV. Appeals in Forma Pauperis

18. Applications and manner of proceeding.

V. General Provisions

19. Record of commissions and oaths.
20. Filing and service.
21. Computation and extension of time.
22. Motions.
23. Briefs.
24. Brief of an amicus curiae.
25. The appendix to the briefs.
26. Filing and service of briefs.
27. Form of briefs, the appendix, motions and other papers.
28. Prehearing conference.
29. Oral argument.
30. Entry and notice of orders and judgments.
31. Interest on judgments.
32. Damages for appeal without merit.
33. Costs.
34. Petitions for rehearing.
35. Notice and copy of decision — remittitur — mandate from United States supreme court.
36. Voluntary dismissal.
37. Substitution of parties.
38. Cases involving constitutional questions where the state is not a party.
39. Calendar — withdrawal of records.
40. Appeals from injunction orders.
41. Statutes and rules amended.
42. Applicability in general.
43. Title — effective date — statutes superseded.

Appendix of Forms

Form
1. Notice of appeal to the supreme court of the state of Montana from a judgment or order of a district court.
2. Affidavit to accompany motion for leave to appeal in forma pauperis.

I. Applicability of Rules

Rule 1. Scope of rules — from what judgment or order an appeal may be taken.

These rules govern procedure in appeals in civil cases to the supreme court of Montana from Montana district courts and original proceedings in the supreme court of Montana. The party applying for original relief is known as the petitioner and the adverse party as the defendant. The party appealing is known as the appellant, and the adverse party as the respondent.

A party aggrieved may appeal from a judgment or order, except when expressly made final by law, in the following cases:

(a) From a final judgment entered in an action or special proceeding commenced in a district court, or brought into a district court from another court or administrative body.

(b) From an order granting a new trial; or refusing to permit an action to be maintained as a class action; or granting or dissolving an injunction; or refusing to grant or dissolve an injunction; or dissolving or refusing to dissolve an attachment; from an order changing or refusing to change the place of trial when the county designated in the complaint is not the proper county; from an order appointing or refusing to appoint a receiver, or giving directions with respect to a receivership, or refusing to vacate an order appointing or affecting a receiver; from an order directing the delivery, transfer, or surrender of property; from any special order made after final judgment; and from such interlocutory judgments or orders, in actions for partition as determine the rights and interests of the respective parties and direct partition to be made. In any of the cases mentioned in this subdivision the supreme court, or a justice thereof, may stay all proceedings under the order appealed from, on such conditions as may seem proper.

(c) From a judgment or order granting or refusing to grant, revoking or refusing to revoke, letters testamentary, or of administration, or of guardianship; or admitting or refusing to admit a will to probate, or against or in favor of the validity of a will, or revoking or refusing to revoke the probate thereof; or against or in favor of setting apart property, or making an allowance for a widow or child; or against or in favor of directing the partition, sale, or conveyance of real property, or settling an account of an executor, or administrator, or guardian; or refusing, allowing, directing the distribution or partition of any estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share; or confirming or refusing to confirm a report of an appraiser setting apart a homestead.

All questions raised on an order overruling a motion for a new trial or on an order changing or refusing to change the place of trial under [R.C.M. 1947, section 93-2906, subdivision 4 thereof or] subsection (2) or (3) of section 25-2-201, Montana Code Annotated, may be raised and reviewed on an appeal from the judgment.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 2. What the court may review on an appeal from a judgment.

Upon appeal from a judgment, the court may review the verdict or decision, and any intermediate order or decision excepted or objected to within the meaning of Rule 46 of the Montana Rules of Civil Procedure, which involves the merits, or necessarily affects the judgment, except a decision or order from which an appeal might have been taken.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 3. Suspension of the rules.

In the interest of expediting decision upon any matter before it, or for other good cause shown, the supreme court may, except as otherwise provided in Rule 21(b), suspend the requirements or provisions of these rules on application of a party or on its own motion and may order proceedings in accordance with its direction.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

II. Appeals from Judgments and Orders of District Courts

Rule 4. How taken.

(a) Filing the notice of appeal. An appeal shall be taken by filing a notice of appeal in the district court. Failure of an appellant to take any step her than the timely filing of a notice of appeal does not affect the validity the appeal, but is ground only for such action as the supreme court deems propriate, which may include dismissal of the appeal.

(b) Joint appeals. If two or more persons are entitled to appeal from a dgment or order of the district court and their interests are such as to ake joinder practicable, they may file a joint notice of appeal, or may join appeal after filing separate notices of appeal as a single appellant.

(c) Content of the notice of appeal. The notice of appeal shall specify e party or parties taking the appeal; and shall designate the judgment or der appealed from. Form 1 in the Appendix of Forms is a suggested form notice of appeal.

(d) Service of notice of appeal. The clerk of the district court shall serve tice of the filing of a notice of appeal by mailing a copy thereof to counsel record of each party other than the appellant, or, if a party is not repre- nted by counsel, to the party at his last known address, and shall mail a py of the notice of appeal to the clerk of the supreme court. The clerk of e district court shall note on each copy served the date on which the notice appeal was filed. If an appellant is represented by counsel, his counsel all provide the clerk with sufficient copies of the notice of appeal to permit e clerk to comply with the requirements of this rule. Failure of the clerk serve notice shall not affect the validity of the appeal. The notice shall sufficient notwithstanding the death of a party or his counsel. The clerk all note in the docket the names of the parties to whom he mails copies, ith the date of mailing.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 5. Time for filing notice of appeal.

The time within which an appeal from a judgment or an order must be ken shall be 30 days from the entry thereof, except that in cases where ser- ce of notice of entry of judgment is required by Rule 77(d) of the Montana ules of Civil Procedure the time shall be 30 days from the service of notice entry of judgment, but if the state of Montana, or any political subdivision ereof, or an officer or agency thereof is a party the notice of appeal shall filed within 60 days from the entry of the judgment or order or 60 days om the service of notice of the entry of judgment. If a timely notice of peal is filed by a party, any other party may file a notice of appeal within days of the date on which the first notice of appeal was filed, or within e time otherwise provided by this rule, whichever period last expires.

The running of the time for filing a notice of appeal is suspended as to l parties by a timely motion filed in the district court by any party pur- ant to the Montana Rules of Civil Procedure hereafter enumerated in this ntence, and the full time for appeal fixed by this rule commences to run nd is to be computed from mailing by the clerk of notice of the entry of ny of the following orders made upon a timely motion under such rules: (1) ranting or denying a motion for judgment under Rule 50(b); (2) granting or enying a motion under Rule 52(b) to amend or make additional findings of ct, whether or not an alteration of the judgment would be required if the otion is granted; (3) granting or denying a motion under Rule 59 to alter r amend the judgment; (4) denying a motion for a new trial under Rule 59.

Upon showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the original time prescribed by this rule.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7 Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 6. Undertaking for costs on appeal.

(a) [Form of undertaking—time for filing]. Within 10 days after service of notice of appeal an undertaking for costs on appeal shall be filed in the district court, or a deposit of the money in the amount thereof be made with the clerk of the district court to abide the event of the appeal, or the undertaking be waived by the adverse party in writing. The undertaking must be executed on the part of the appellant by at least 2 sureties, or by a corporate surety as may be authorized by law, to the effect that the appellant will pay all damages and costs which may be awarded against him on the appeal, or on the dismissal thereof, not exceeding $500. If the undertaking on appeal is not filed within the time specified, or if the undertaking filed is found insufficient, and if the action is not yet docketed with the supreme court, an undertaking may be filed at such time before the action is so docketed as may be fixed by the district court. After the action is so docketed, application for leave to file an undertaking may be made only in the supreme court The undertaking for costs herein provided may be combined in a single document with a supersedeas bond under Rule 7.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 7. Stay of judgment or order pending appeal.

(a) [Stay upon entry of judgment—undertaking]. Upon entry of a judgment or order a party may apply to the district court on notice or ex parte for a stay of the execution of the judgment or order. The court in its discretion may grant said stay for such period of time and under such conditions as the court deems proper, including restraining the party from disposing of encumbering, or concealing his property. Upon service of notice of appeal, if the court has made no such order or the appellant desires a stay for a longer period than ordered, he may present to the district court and secure its approval of a supersedeas bond which shall have such surety or sureties as are required for an undertaking for costs on appeal prescribed by Rule 6(a) The bond shall be conditioned for the satisfaction of the judgment or order in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment or order is affirmed, and to satisfy in full such modification of the judgment or order and such costs, interest and damages as the supreme court may adjudge and award. When the judgment or order is for the recovery of money not otherwise secured, the amoun of the bond shall be fixed at such sum as will cover the whole amount of the judgment or order remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the district court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment or order determines the disposition of property in controversy as in real actions, replevin, and actions to foreclose mortgages, or when such property is in the custody of the sheriff or when the proceeds of such property or a bond for its value is in the custody or control of the court the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, costs on appeal, interest, and damages for delay. On application, the supreme court in the interest of justice may suspend, modify, restore, or grant any order made under this subdivision.

(b) [Sale of perishable property]. If the judgment or order appealed from directs the sale of perishable property, the district court may order the property to be sold and the proceeds thereof to be deposited, to abide the judgment of the supreme court.

(c) [Cases in which stay of proceedings not allowed]. No stay of proceedings shall be allowed upon a judgment or order which adjudges the defendant guilty of usurping, or intruding into, or unlawfully holding public office, civil or military, within this state; or which grants a writ of mandamus, or of prohibition, against a tribunal, corporation, public officer, or board, commanding certain acts to be done which ought to be done by such tribunal, corporation, public officer, or board, and not involving the payment or allowance of money or its equivalent.

History: **En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.**

Rule 8. Sureties and their justification.

(a) [Liability of surety—enforcement]. In cases where an undertaking on appeal or supersedeas bond with sureties is required, the provisions of sections 25-1-402, 25-13-105, 33-26-101, 33-26-102, and 72-31-101, Montana Code Annotated, apply. By entering into an undertaking on appeal or supersedeas bond given pursuant to Rules 6 and 7, the surety submits himself to the jurisdiction of the district court and irrevocably appoints the clerk of the district court as his agent upon whom papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of any independent action. The motion and such notice of the motion as the district court prescribed may be served on the clerk of that court, who shall forthwith mail copies to each surety whose address is known.

(b) [Justification of sureties]. A party may except to the sufficiency of the sureties to any bond or undertaking mentioned in this rule at any time within 30 days after the filing of such bond or undertaking; and unless they or other sureties, within 20 days after service of notice of such exception, justify before a judge of the district court, or the clerk thereof, upon 5 days' notice to the other parties of the time and place of justification, execution of the judgment or order appealed from is no longer stayed.

History: **En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.**

Rule 9. The record on appeal.

(a) Composition of the record on appeal. The original papers and exhibits filed in the district court, the transcript of proceedings, if any, and a certified copy of the docket entries prepared by the clerk of the district court shall constitute the record on appeal in all cases.

(b) The transcript of proceedings — duty of appellant to order — notice to respondent if partial transcript is ordered — costs of producing. Within 0 days after filing the notice of appeal the appellant shall order from the reporter a transcript of such parts of the proceedings not already on file as he deems necessary for inclusion in the record. In all cases where the appellant intends to urge insufficiency of the evidence to support the verdict, order or judgment in the district court, it shall be the duty of the appellant to order the entire transcript of the evidence. Wherever the sufficiency of the evidence to support a special verdict or answer by a jury to an interrogatory or to support a specific finding of fact by the trial court, is to be raised on the appeal by the appellant, he shall be under a duty to include in the transcript all evidence relevant to such verdict, answer or finding. Unless the entire transcript is to be included, the appellant shall, within the time above provided, file and serve on the respondent a description of the parts of the transcript which he intends to include in the record and a statement of the issues which he intends to present on the appeal. If the respondent deems a transcript of other parts of the proceedings to be necessary he shall within 10 days after such filing and service order such parts from the reporter or procure an order from the district court requiring the appellant to so do.

The cost of producing the transcript shall be paid by the appellant, or he shall make satisfactory arrangements with the reporter for the payment o such cost; but, if the appellant considers that any part of the record designated by the respondent for inclusion is unnecessary for the determination of the issues presented, he shall advise the respondent, and the district court may impose upon the respondent the cost of producing any part which it deems unnecessary for the determination of the issues.

The reporter shall certify the correctness of the transcript.

(c) Statement of the evidence or proceedings when no report was made or when the transcript is unavailable. If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may, within 10 days from the hearing or trial or such time extended as the district court may for good cause shown permit, prepare a statement of the evidence or proceedings from the best available means including his recollection. The statement shall be served on the respondent who may serve objections or propose amendments thereto within 10 days after service. Thereupon, the statement and any objections or proposed amendments shall be submitted for settlement and approval to the distric judge who handled the proceedings, and as settled and approved shall be included by the clerk of the district court in the record on appeal. A judge may settle and approve such record after he ceases to be a judge. If such judge before the statement is settled and approved dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle and approve the statement, it shall be settled and approved in such manner a the supreme court may direct.

(d) Agreed statement as the record on appeal. In lieu of the record on appeal as defined in subdivision (a) of this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appea arose and were decided in the district court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement conforms to the truth, it together with such additions as the court may consider necessary fully to present the issues raised by the appeal, shall be approved by the distric court and shall then be certified to the supreme court as the record on appeal and transmitted thereto by the clerk of the district court within th time provided by Rule 10. Copies of the agreed statement may be filed a the appendix required by Rule 25.

(e) Correction or modification of the record. If any difference arises as whether the record truly discloses what occurred in the district court, the ifference shall be submitted to and settled by that court and the record ade to conform to the truth. If anything material to either party is omitted om the record by error or accident or is misstated therein, the parties by ipulation, or the district court, either before or after the record is transitted to the supreme court, on proper suggestion or of its own initiative, ay direct that the omission or misstatement be corrected, and if necessary at a supplemental record be certified and transmitted. All other questions to the form and content of the record shall be presented to the supreme ourt.

(f) Findings of fact and conclusions of law. In all nonjury cases where dgment is rendered on the basis of findings of fact and conclusions of law ch findings and conclusions by the district court should be incorporated in e appendix to appellant's brief, along with the district court's opinion, if ny.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-10, ct. 22, 1971, eff. Jan. 1, 1972.

Rule 10. Transmission of the record.

(a) Time for transmission — number of copies of transcript — duty of ppellant. The record on appeal, including the transcript necessary for the etermination of the appeal, shall be transmitted to the supreme court ithin 40 days after the filing of the notice of appeal unless the time is ortened or extended by an order entered under subdivision (c) of this rule. ix copies of each transcript must be lodged with the clerk of this court for ling. Promptly after filing the notice of appeal the appellant shall comply ith the provisions of Rule 9(b) and shall take any other action necessary to nable the clerk to assemble and transmit the record. If more than one ppeal is filed, each appellant shall comply with the provisions of Rule 9(b) nd this subdivision, and a single record shall be transmitted within 40 days fter the filing of the final notice of appeal.

(b) Duty of clerk to transmit the record. When the record is complete r purposes of the appeal, the clerk of the district court shall transmit it to e clerk of the supreme court. The clerk shall number the documents comrising the record and shall transmit with the record a numbered list of the ocuments, identifying each with reasonable definiteness. Documents in ulky containers and physical exhibits other than documents shall not be ansmitted by the clerk unless he is directed to do so by a party or by the lerk of the supreme court. A party must make advance arrangements with e clerk of the district court for the transportation of bulky or weighty exhiits and with the clerk of the supreme court for their receipt. Transmission f the record is effected when the clerk of the district court mails or otherise forwards the record to the supreme court. The clerk of the district court hall indicate, by endorsement on the face of the record or otherwise, the ate upon which it is transmitted to the supreme court.

(c) Extension of time for transmission of the record — reduction of me. The district court may extend the time for transmitting the record. he request for extension must be made within the time originally prescribed r within an extension previously granted, and the district court shall not extend the time to a day more than 90 days from the date of filing of the first notice of appeal. If the district court is without authority to grant the relief sought or has denied a request therefor, the supreme court may on motion extend the time for transmitting the record or may permit the record to be transmitted and filed after the expiration of the time allowed or fixed. A motion for an extension of time for transmitting the record made in either court shall show that the inability of the appellant to cause timely transmission of the record is due to causes beyond his control or to circumstances which may be deemed excusable neglect. If a request for an extension of time for transmitting the record has been previously denied, the motion shall set forth the denial and shall state the reasons therefor, if any were given.

The district court or the supreme court may require the record to be transmitted and the appeal to be docketed at any time within the time otherwise fixed or allowed therefor.

(d) Retention of the record in the district court by order of court. The supreme court may provide by rule or order that a certified copy of the docket entries shall be transmitted in lieu of the entire record, subject to the right of any party to request at any time during the pendency of the appeal that designated parts of the record be transmitted.

If the record is required in the district court for use there pending the appeal, the district court may make an order to that effect, and the clerk of the district court shall retain the record and shall transmit a copy of the order and of the docket entries together with such parts of the original record as the district court shall allow and copies of such parts as the parties may designate.

If the record is retained in the district court by order of either court, the clerk of the district court shall retain it subject to the order of the supreme court, and transmission of the copy of the docket entries shall constitute transmission of the record.

(e) Stipulation of parties that parts of the record be retained in the district court. The parties may agree by written stipulation filed in the district court that designated parts of the record shall be retained in the district court unless thereafter the supreme court shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the record on appeal for all purposes.

(f) Record for preliminary hearing in the supreme court. If prior to the time the record is transmitted a party desires to make in the supreme court a motion for dismissal, for a stay pending appeal, for additional security on the undertaking on appeal or on a supersedeas bond, or for any intermediate order, the clerk of the district court at the request of any party shall transmit to the supreme court such parts of the original record as the party shall designate.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 11. Docketing the appeal — filing of the record.

(a) Docketing the appeal. Within the time allowed or fixed for transmission of the record, the appellant shall pay to the clerk of the supreme court the fee for filing the record on appeal fixed by sections 3-2-403 and 3-2-404 of the Montana Code Annotated, and the clerk shall thereupon enter the appeal upon the docket. If an appellant is authorized to prosecute the appeal ithout prepayment of fees, the clerk shall enter the appeal upon the docket or before the time of filing the record. An appeal shall be docketed under e title given to the action in the district court with such addition as is cessary to indicate the identity of the appellant.

(b) Filing of the record. Upon receipt of the record by the clerk of the preme court following its timely transmittal, and after the appeal has been mely docketed, the clerk shall file the record. The clerk shall immediately ve notice to all parties of the date on which the record was filed.

(c) Dismissal for failure of appellant to cause timely transmission or to cket appeal. If the appellant shall fail to cause timely transmission of the cord or to pay the filing fee if a filing fee is required, any respondent may le a motion in the supreme court to dismiss the appeal. The motion shall e supported by a certificate of the clerk of the district court showing the ate and substance of the judgment or order from which the appeal was ken, the date on which the notice of appeal was filed, and the expiration ate of any order extending the time for transmitting the record; and by roof that 7 days' notice in writing has been served on the appellant that pplication will be made for dismissal of the appeal. The clerk shall docket e appeal for the purpose of permitting the court to entertain the motion, ithout requiring payment of the filing fee, but the appellant shall not be ermitted to appear without payment of the fees unless he is otherwise xempt therefrom. Instead of filing a motion to dismiss the appeal, the spondent may cause the record to be transmitted and may docket the ppeal, in which event the appeal shall proceed as if the appellant had used it to be docketed.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 12. Effect of dismissal.

The dismissal of an appeal is in effect an affirmance of the judgment or rder appealed from, unless the dismissal is expressly made without prejudice another appeal.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 13. Acts of executors, administrators or guardians valid hen appointment vacated.

When the judgment or order appointing an executor, or administrator, or uardian is reversed on appeal, for error, and not for want of jurisdiction of e court, all lawful acts in administration upon the estate performed by such xecutor, or administrator, or guardian, if he have qualified, are as valid as such judgment or order had been affirmed.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 14. Ruling against respondent may be reviewed.

Whenever the record on appeal shall contain any order, ruling, or proceedg of the trial court against the respondent, affecting his substantial rights n the appeal of said cause, together with any required objection or exception f such respondent, the supreme court on such appeal shall consider such rders, rulings, or proceedings, and the objections and exceptions thereto, nd shall reverse or affirm the cause on said appeal according to the substanal rights of the respective parties, as shown upon the record. And no cause shall be reversed upon appeal by reason of any error committed by the tria court against the appellant, where the record shows that the same resul would have been attained had such trial court not committed an error o errors against the respondent.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 15. Remedial powers of the supreme court.

When the judgment or order is reversed or modified, the supreme cour may make complete restitution of all property and rights lost by the erroneous judgment or order, so far as such restitution is consistent with protectio of a purchaser of property at a sale ordered by the judgment, or had unde process issued upon the judgment, on an appeal from which the proceeding were not stayed; and for relief in such cases the appellant may have hi action against the respondent, enforcing the judgment for the proceeds of th sale of the property, after deducting therefrom the expenses of the sale.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 16. Remittitur must be certified to the clerk of the district court.

When judgment is rendered upon the appeal, it must be certified by th clerk of the supreme court to the clerk of the district court from which th appeal is taken. The clerk of the district court must enter at length in th records of the court the certificate received. Also, in cases of appeal from judgment, the clerk must enter a minute of the judgment of the suprem court on the docket against the original entry; and in cases of appeal fro an order, he must enter a minute against the entry of the order appeale from, containing a reference to the certificate, with a brief statement tha such order has been affirmed, reversed, or modified by the supreme court o appeal.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

III. Original Proceedings — Extraordinary Writs

Rule 17. Acceptance and manner of conducting.

(a) When accepted. The supreme court is an appellate court but it empowered by the constitution of Montana to hear and determine such ori inal and remedial writs as may be necessary or proper to the complete exe cise of its jurisdiction. The institution of such original proceedings in th supreme court is sometimes justified by circumstances of an emergen nature, as when a cause of action or a right has arisen under conditio making due consideration in the trial courts and due appeal to this court a inadequate remedy, or when supervision of a trial court other than by appe is deemed necessary or proper.

(b) How commenced and conducted. Proceedings commenced in th supreme court originally to obtain writs of habeas corpus, injunction, revie mandate, quo warranto, supervisory control, and other remedial writs orders, shall be commenced and conducted in the manner prescribed by th Code of Civil Procedure for the conduct of such or analogous proceedin and by these additional rules. All papers filed shall conform to the requir ments of Rule 27, except typewritten applications, briefs, copies of exhibi

(g) Briefs: In those cases in which oral argument is ordered, each party shall serve and file briefs in full conformance with Rules 20, 23, and 27, and containing a statement of the facts and of the points of law applicable, with the authorities relied upon.

All briefs shall be served and filed according to the time schedule set forth in the order, and in no event later than 24 hours prior to the time fixed for oral argument.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-10, Oct. 22, 1971, eff. Jan. 1, 1972; amd. Sup. Ct. Ord. eff. Jan. 1, 1981.

III. Original Proceedings—Extraordinary Writs

Rule 17. Acceptance and manner of conducting.

(a) When accepted: The Supreme Court is an appellate court but it is empowered by the constitution of Montana to hear and determine such original and remedial writs as may be necessary or proper to the complete exercise of its jurisdiction. The institution of such original proceedings in the Supreme Court is sometimes justified by circumstances of an emergency nature, as when a cause of action or a right has arisen under conditions making due consideration in the trial courts and due appeal to this court an inadequate remedy, or when supervision of a trial court other than by appeal is deemed necessary or proper.

(b) How commenced and conducted: Proceedings commenced in the Supreme Court originally to obtain writs of habeas corpus, injunction, review, mandate, quo warranto, supervisory control, and other remedial writs or orders, shall be commenced and conducted in the manner prescribed by the applicable sections of the Montana Code Annotated for the conduct of such or analogous proceedings and by these additional rules. All papers filed shall conform to the requirements of Rule 27, except that typewritten applications, briefs, copies of exhibits and the like may be used without securing permission of the Chief Justice as required by Rule 27(a). The provisions of Rule 27(b) shall be observed.

(c) Applications — where and when filed: An original application may be made to the Supreme Court at any time. The moving party's application and all supporting documents shall be filed with the clerk of the Supreme Court.

(d) Applications — what to contain: The application for the issuance of the above writs or orders must set forth, in addition to the other requisite matters, the particular questions and issues anticipated or expected to be raised in the proceeding and also the fact which renders it necessary and proper that the writ should issue originally from the Supreme Court; the said matters will be taken into consideration by the Court in determining the necessity and propriety of accepting jurisdiction and granting the alternative writ or order to show cause. Each application shall also set forth as exhibits, without repetition of title of court and cause, a copy of each judgement, order, notice, pleading document, proceeding or court minute referred to in the application, or which is necessary to make out a prima facie case or to substantiate the pleading or conclusion or legal effect. A memorandum or authorities must be filed with the application. Counsel shall file with the clerk of this Court the original court file, unless for some reason the same is no available.

(e) Procedure: The Supreme Court shall consider an application for an extraordinary writ at the Court's next court conference following the filing of the application. On the basis of the application filed, the Court shall as promptly a possible, dismiss the petition, accept jurisdiction, or order a response reserving th question of jurisdiction. Only in extraordinary cases will the Court grant oral argument to determine the necessity and propriety of accepting jurisdiction.

Unless oral argument is ordered by this Court in order to establish jurisdiction the Court will enter an appropriate order forthwith. Such order may dismiss th petition, grant the relief requested, order a hearing on the application, or issue an other writ or order deemed appropriate in the circumstances.

(f) Oral argument: When ordered by this Court, an adversary hearing on th application shall be held at the time fixed by the order. The oral argument shall b conducted in the same manner as in the argument of appeals, with the same tim limits for presentation, and with the applicant opening and closing the argumen nd the like may be used without securing permission of the chief justice as quired by Rule 27(a). The provisions of Rule 27(b) shall be observed.

(c) Applications — when filed. The moving party's application shall be ed with the clerk of the supreme court 1 hour prior to its presentation to e court.

(d) Applications — what to contain. The application for the issuance of ny of the above writs or orders must set forth, in addition to the other quisite matters, the particular questions and issues anticipated or expected be raised in the proceeding, and also the fact which renders it necessary nd proper that the writ should issue originally from the supreme court; the id matters will be taken into consideration by the court in determining the ecessity and propriety of accepting jurisdiction and granting the alternative rit or order to show cause. Each application shall also set forth as exhibits, ithout repetition of title of court and cause, a copy of each judgment, order, otice, pleading, document, proceeding or court minute referred to in the pplication, or necessary to make out a prima facie case or to substantiate e pleading or conclusion or legal effect. A memorandum of authorities must e filed with the application. On original applications counsel shall file with e clerk of this court the original court file, with the original application, nless for some reason the same is not available.

(e) Applications — how and when presented. The supreme court will eceive and hear original applications in open court on any day when the ourt is in session; but at least an hour's prior notice of such presentation hall be given by counsel to the chief justice or acting chief justice. Not over 5 minutes shall be allowed for the presentation of any such application nless on prior request further time is granted.

(f) Issuance of alternative writ or order to show cause. This court will, s promptly as possible after the presentation of an application, either dismiss the same, issue an alternative writ, order to show cause, or such other emedial writ or order as it deems expedient.

(g) Briefs. At or before the time set for final hearing, each party shall erve and file his brief in full conformance with Rules 20, 23 and 27, and ontaining a statement of the facts and of the points of law applicable, with e authorities relied upon.

(h) Hearing — when had. Unless otherwise ordered the hearing shall be ad at the time fixed for the return. At or prior to said return time the pposing party shall serve and file, without waiver, any and all pleadings and otions desired to be presented, including answer or return, and all issues hall be argued at the hearing, the applicant opening and closing, and the arties being allowed the same time as upon argument of appeals. If testimony becomes necessary a reference will be ordered.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-10, ct. 22, 1971, eff. Jan. 1, 1972.

IV. Appeals in Forma Pauperis

Rule 18. Applications and manner of proceeding.

(a) Application to district court. A party who desires to proceed on ppeal in forma pauperis shall file in the district court a motion for leave so

to proceed together with an affidavit showing, in the detail prescribed b
Form 2 of the Appendix of Forms, his inability to pay the fees and costs c
the appeal or to give security therefor, his belief that he is entitled t
redress, and a statement of the issues he intends to present on appeal. If th
motion is granted, the party may proceed on appeal without further applica
tion to the supreme court and without payment of fees or costs or the givin
of security therefor. If the motion is denied, the district court shall state th
reasons for the denial.

(b) Application to the supreme court. If the motion for leave to procee
on appeal in forma pauperis is denied by the district court, a motion fo
leave so to proceed may be filed in the supreme court within 30 days afte
entry of the order of denial. The motion shall be accompanied by a copy o
the affidavit filed in the district court and of the statement of reasons fo
denial given by the district court.

(c) Form of briefs, appendices and other papers. Parties allowed to pro
ceed in forma pauperis may file briefs, appendices and other papers in type
written form.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

V. General Provisions

Rule 19. Record of commissions and oaths.

(a) Commissions and oaths. The commissions and oaths of the justice
and the clerk of this court, and the attorney general shall be recorded in th
records of this court.

(b) Minutes of court. The minutes of this court shall be approved by th
chief justice (or in his absence by the associate justice having the shortes
term to serve), and attested by the clerk.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 20. Filing and service.

(a) Filing. Papers required or permitted to be filed must be placed i
the custody of the clerk within the time fixed for filing. Filing may be accom
plished by mail addressed to the clerk, but filing shall not be timely unles
the papers are actually received within the time fixed for filing. If a motio
requests relief which may be granted by a single judge, the judge may permi
the motion to be filed with him, in which event he shall note thereon th
dates of filing and shall thereafter transmit it to the clerk.

(b) Service of all papers required. Copies of all papers, including an
transcript, filed by any party and not required by these rules to be serve
by the clerk shall, at or before the time of filing, be served by the party o
person acting for him on all other parties to the appeal or review. Service o
a party represented by counsel shall be made on counsel.

(c) Manner of service. Service may be personal or by mail. Personal ser
vice includes delivery of the copy to a clerk or other responsible person a
the office of counsel. Service by mail is complete on mailing.

(d) Proof of service. Papers presented for filing shall contain acknowl
edgment of service by the person served or proof of service in the form o
a statement of the date and manner of service and of the names of the per
sons served, certified by the person who made service. Proof of service ma

pear on or be affixed to the papers filed. The clerk may permit papers to filed without acknowledgment of proof of service but shall require such be filed promptly thereafter.

History: **En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.**

Rule 21. Computation and extension of time.

(a) Computation of time. In computing any period of time prescribed by ese rules, by an order of court, or by any applicable statute, the day of the t, event, or default from which the designated period of time begins to run all not be included. The last day of the period shall be included, unless it a Saturday, Sunday or a legal holiday. When the period of time prescribed allowed is less than 7 days, intermediate Saturdays, Sundays and legal lidays shall be excluded in the computation.

(b) Extension of time. The court for good cause shown may upon otion extend the time prescribed by these rules or by its order for doing ny act, and may thereby permit an act to be done after the expiration of ich time if the failure to act was excusable under the circumstances; but the urt may not extend the time for filing a notice of appeal, except as pro- ded in Rule 5.

(c) Additional time after service by mail. Whenever a party is required permitted to do any act within a prescribed period after service of a paper pon him and the paper is served by mail, 3 days shall be added to the pre- ribed period.

History: **En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.**

Rule 22. Motions.

Unless another form is prescribed by these rules, an application for an rder or other relief shall be made by filing a motion in writing for such rder or relief. The motion shall state with particularity the grounds therefor nd shall set forth the order or relief sought. If a motion is supported by riefs, affidavits or other papers, they shall be served and filed with the notion. Motions for procedural orders may be determined ex parte. The upreme court may authorize disposition of motions for procedural orders by single judge. If a motion seeks dismissal of the appeal or other substantial elief, any party may file an answer in opposition within 7 days after service f the motion, or within such time as the court may direct. Motions, support- ng papers and any response thereto may be typewritten.

At the time of filing a motion counsel shall present a proposed order, ogether with sufficient copies for service upon all counsel of record.

History: **En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.**

Rule 23. Briefs.

(a) Brief of the appellant. The brief of the appellant shall contain under ppropriate headings and in the order here indicated:

(1) A table of contents, with page references, and a table of cases (alpha- etically arranged), statutes and other authorities cited, with references to he pages of the brief where they are cited.

(2) A statement of the issues presented for review.

(3) A statement of the case. The statement shall first indicate briefly the ature of the case and its disposition in the court below, e.g.: "The plaintiff

brought this action in the district court to recover damages for the wrongful death of her husband. The jury returned a verdict for the plaintiff. On motion of the defendant the trial judge entered judgment for the defendant n. o. v. on the ground that there was no evidence to support a finding of negligence on the part of the defendant. From this judgment the plaintiff appeals."

There shall follow a statement of the facts relevant to the issues presented for review, with references to the pages of the parts of the record at which material facts appear (see subdivision (e)).

(4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and pages of the record relied on.

(5) A short conclusion stating the precise relief sought.

(b) Brief of the respondent. The brief of the respondent shall conform to the requirements of subdivision (a) (1) to (4), except that a statement of the issues or of the case need not be made unless the respondent is dissatisfied with the statement of the appellant.

(c) Reply brief. The appellant may file a brief in reply to the brief of the respondent. The reply brief must be confined to new matter raised in the brief of the respondent. No further briefs may be filed except with leave of court.

(d) References in briefs to parties. Counsel will be expected in their briefs and oral arguments to keep to a minimum references to parties by such formal designations as "appellant" and "respondent." It promotes clarity to use names or descriptive terms such as "the employee," "the injured person," "the taxpayer," etc.

(e) References in briefs to the record. Whenever a reference is made in the briefs to the record, the reference must be to particular parts of the record, suitably designated, and to specific pages of each part, e. g., Answer, p. 7; Motion for Summary Judgment, p. 3; Transcript, p. 231. Intelligible abbreviations may be used. If reference is made to an exhibit, reference shall be made to the pages of the transcript on which the exhibit was identified, offered, and received or rejected.

(f) Reproduction of statutes, rules, regulations, etc. If determination of the issues presented requires the study of statutes, rules, regulations, etc., or relevant parts thereof, they may be reproduced in the brief or in an addendum at the end, or they may be supplied to the court in pamphlet form. No such reproduction is required, unless ordered by the supreme court. When the error alleged is to the charge of the court, the brief of the parties shall set out with appropriate transcript references the part referred to totidem verbis, whether it be directed to instructions given or instructions refused.

(g) Length of briefs and costs. Except by permission of the court briefs shall not exceed 50 pages of standard typographic printing or 70 pages of printing by any other process of duplicating or copying, exclusive of pages containing the table of contents, tables of citations and any addendum containing statutes, rules, regulations, etc. For purposes of assessing costs under Montana Code Annotated, section 25-10-104, reasonable costs shall be limited as follows: For appellant's brief 50 pages; for respondent's brief 40 ges; for reply brief 15 pages. In addition, reasonable costs for briefs shall limited to $250 for appellant's brief and $200 for respondent's brief.

(h) Briefs in cases involving cross appeals. If a cross appeal is filed, the aintiff in the court below shall be deemed the appellant for the purposes this rule and Rules 25 and 26, unless the parties otherwise agree or the urt otherwise orders. The brief of the respondent shall contain the issues d argument involved in his appeal as well as the answer to the brief of the pellant.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-10, t. 22, 1971, eff. Jan. 1, 1972.

Rule 24. Brief of an amicus curiae.

A brief of an amicus curiae may be filed only if accompanied by written nsent of all parties, or by leave of court granted on motion. A motion for ave shall identify the interest of the applicant and shall state the reasons y a brief of an amicus curiae is desirable. A motion of an amicus curiae r leave to participate in the oral argument will be granted only for extraor- nary reasons.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 25. The appendix to the briefs.

(a) Use of an appendix. At the time before final decision, the supreme urt may order an appendix to any brief. Also, either the appellant or spondent may, if he deems it desirable, prepare, file and serve with his ief an appendix.

(b) Contents of the appendix. Unless otherwise ordered by the supreme urt, an appendix shall contain: (1) the relevant docket entries in the pro- eding below; (2) any relevant pleading and relevant portions of the charge, nding and opinion; (3) the judgment, order or decision in question; and (4) ch other parts of the record as any party deems it essential for the judges the court to read in order to decide the issues presented. In designating rts of the record for inclusion in the appendix, the parties shall have gard for the fact that the entire record is always available to the court for ference or examination and shall not engage in unnecessary designation.

(c) Arrangement of the appendix. At the beginning of the appendix ere shall appear a chronological list of the parts of the record which it con- ins. Each part of the record shall be listed by the descriptive title given to at part by the reference made to it in the briefs. The page or pages of the pendix at which each part of the record thus listed appears shall be set t opposite each listing in a column at the right, so as to permit immediate cation in the appendix of the parts of the record referred to in the briefs d contained in the appendix.

The relevant docket entries in the proceeding below shall follow the list of ntents. Thereafter, the parts of the record shall be set out in chronological der. The original paging of each part of the record set out in the appendix all be indicated by placing in brackets the number of the original page at e place where that page begins. Omissions in the text of papers or of testi- ony must be indicated by asterisks. A question and its answer may be con- ined in a single paragraph.

(d) Reproduction of exhibits. Exhibits may be contained in a separate volume, suitably indexed.

History: **En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.**

Rule 26. Filing and service of briefs.

(a) Time for filing briefs. The appellant shall serve and file his brief within 30 days after the date on which the record is filed. The respondent shall serve and file his brief within 30 days after service of the brief of the appellant. The appellant may serve and file a reply brief within 14 days after service of the brief of the respondent, but, except for good cause shown, a reply brief must be served and filed at least 3 days before argument.

(b) Number of copies to be filed and served. Ten copies of each brief shall be filed with the clerk of the supreme court unless otherwise ordered by the court, and one copy of each brief shall be served on counsel for each party separately represented. The clerk will not accept a brief for filing unless it is accompanied by acknowledgment or proof of service as required by Rule 20.

(c) Consequences of failure to file briefs. If an appellant fails to file his brief within the time provided by this rule, or within the time extended, a respondent may move for dismissal of the appeal. If a respondent fails to file his brief, he will not be heard at oral argument except by permission of the court.

History: **En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.**

Rule 27. Form of briefs, the appendix, motions and other papers.

(a) Form of briefs, appendices and separate volumes of exhibits. Briefs, appendices and separate volumes of exhibits may be produced by standard typographic printing or by any duplicating or copying process capable of producing a clear black image on white paper. Typewritten copies of briefs, appendices and separate volumes of exhibits may not be submitted without permission of the chief justice of the supreme court, except in behalf of parties allowed to proceed in forma pauperis. Pica solid is the smallest letter and the most compact form of composition allowed for all printed matter. Briefs, appendices and separate volumes of exhibits shall be on white uncalendered book paper in book or booklet form. If produced by the standard typographic printing process, the pages shall be 10 inches long and 7 inches wide, with a margin on the outer edge not less than 1 inch wide and on the inner edge not less than 2 inches wide. If produced by a duplicating or copying process, the pages shall be 11 inches long and 8 ½ inches wide, with a margin on the outer edge not less than 1 inch wide and on the inner edge not less than 2 inches wide. The pages shall be fastened at the side and numbered at the top.

(b) Typewritten papers and motions. Papers not required to be produced in a manner prescribed by subdivision (a) of this rule shall be plainly and legibly written by a typewriter with a new black ribbon and new black carbon paper of good grade, in double spacing, except that quotations may be single spaced, on one side only of white typewriter paper, 8 ½ inches wide and 13 inches long, numbered at the bottom, with a ruled margin of 1 ½ inches on the left-hand side of the page and 1 inch on the right-hand side d numbered lines, not more than 32 lines to the page. The pages shall be und at the left-hand side into volumes not containing more than 250 ges; provided, however, that if the pages number 50 or less they may be und at the top.

In collating typewritten papers the copies shall not be mixed, but each py shall consist throughout of uniform pages. Each page of every copy shall opaque and each line of print thereon plainly legible. The difficulty of amining transparent, illegible and nonuniform typewritten copies has come so great that this rule will be strictly applied and papers not comply- g with it will not be received.

(c) First page and cover. All papers shall be bound in cardboard or steboard covers, unless bound at the top under subdivision (b) of this rule, which case they may be bound in cover paper. On the first page and cover all papers must be stated the title of this court, the title of the case as the court below, adding to the words "Plaintiff" and "Defendant," the rds "Appellant" and "Respondent" as the case may require, the names of unsel for appellant and respondent, the title of the papers, as "Appellant's ief," "Appendix to Appellant's Brief," etc., and the venue from which the peal is taken.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 28. Prehearing conference.

The court may direct the attorneys for the parties to appear before the urt or a judge thereof for a prehearing conference to consider the simpli- ation of the issues and such other matters as may aid in the disposition the proceedings by the court. The court or judge shall make an order ich recites the action taken at the conference and the agreements made by e parties as to any of the matters considered and which limits the issue to ose not disposed of by admission or agreements of counsel, and such order en entered controls the subsequent course of the proceedings, unless modi- d to prevent manifest injustice.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 29. Oral argument.

(a) Notice of hearing — postponement. The clerk shall advise all parties the time and place at which oral argument will be heard. A request for stponement of the hearing must be made by motion filed reasonably in vance of the date fixed for hearing.

(b) Time allowed for argument. Upon oral argument of an appeal or ginal proceeding, 40 minutes will be allowed appellant or applicant and 30 nutes to respondent. If counsel is of the opinion that additional time is cessary for the adequate presentation of his argument, he may request ch additional time as he deems necessary by motion filed reasonably in vance of the date fixed for hearing. A party is not obliged to use all of the ne allowed, and the court may terminate the argument whenever in its lgment further argument is unnecessary.

(c) Order and content of argument. The appellant or applicant is enti- d to open and conclude the argument. The opening argument shall include fair statement of the case, and the closing argument shall be limited to buttal of respondent's argument. Counsel will not be permitted to read at ngth from briefs, records or authorities.

(d) Cross and separate appeals. A cross or separate appeal shall be argued with the initial appeal at a single hearing, unless the court otherwise directs. If a case involves a cross appeal, the plaintiff in the action below shall be deemed the appellant for the purpose of this rule unless the parties otherwise agree or the court otherwise directs. If separate appellants support the same argument, care shall be taken to avoid duplication of argument at the hearing.

(e) Nonappearance of counsel — failure to file briefs. If counsel for a party fails to appear to present argument, the court may hear argument on behalf of a party whose counsel is present, and the case will be decided on the briefs and the argument heard. If no counsel appear for any party, the case will be decided on the briefs unless the court shall otherwise order.

(f) Submission on briefs. By agreement of the parties, a case may be submitted for decision on the briefs, but the court may direct that the case be argued.

(g) Use of physical exhibits at hearing — removal. If physical exhibits other than documents are to be used at the hearing, counsel shall arrange to have them placed in the courtroom before the court convenes on the date of the hearing. After the hearing counsel shall cause the exhibits to be removed from the courtroom unless the court otherwise directs. If exhibits are not reclaimed by counsel within a reasonable time after notice is given by the clerk, they shall be destroyed or otherwise disposed of as the clerk shall think best.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 30. Entry and notice of orders and judgments.

(a) Entry and notice. The notation of a judgment or order in the docket constitutes entry thereof. Upon entry of a judgment or order, the clerk shall promptly mail to all parties a copy of the judgment or order, and notice of the date of entry thereof.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 31. Interest on judgments.

If a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was rendered or made in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 32. Damages for appeal without merit.

If the supreme court is satisfied from the record and the presentation of the appeal, that the same was taken without substantial or reasonable grounds, but apparently for purposes of delay only, such damages may be assessed on determination thereof as under the circumstances are deemed proper.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 33. Costs.

(a) Costs on appeal. Costs on appeal will be taxed as provided by Montana Code Annotated, section 25-10-104, and if not otherwise provided by the court in its decision, will automatically be awarded to the successful party against the other party. All costs on appeal shall be claimed as provided by section 25-10-503, Montana Code Annotated.

(b) Costs of briefs and appendices. The cost of printing or otherwise producing briefs and appendices shall be taxable at rates not higher than specified in Rule 23(g).

(c) Other costs taxable. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

(d) Costs in original proceedings. Costs in original proceedings, including reviews other than by appeal, will be taxed as provided by Montana Code Annotated, sections 25-10-101, 25-10-102, 25-10-103, and 25-10-105, and if not otherwise provided by the court in its decision, will be awarded to the successful party against the other party; provided, however, that costs awarded to plaintiff or relator in special proceedings to review inferior court rulings, orders or judgments will ordinarily be assessed against the real party in interest, namely, the party interested in upholding the inferior court's action, rather than against the state, county, municipality, subdivision, judge or justice.

(e) Unnecessary costs. Whenever it appears that the successful party has caused any redundant, useless or unnecessary matter to be incorporated in the record, briefs, or appendices, whether on appeal or in a special proceeding, he shall not recover as part of his costs so much of the expense as is occasioned thereby.

(f) Notation by clerk. The clerk of the supreme court shall, in all cases, include in the order of judgment of affirmance, reversal or modification on appeal, or for the issuance of a peremptory writ in an original proceeding, and in the remittitur, peremptory writ or judgment, a clause awarding the costs in accordance with this rule or the special order of this court, to be recovered after claim and ascertainment or taxation thereof in the manner prescribed by law; and the clerk shall also furnish therewith an itemized statement of such costs as have been paid by him.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-8, Sept. 10, 1968, eff. Jan. 1, 1969.

Rule 34. Petitions for rehearing.

When, in appeals or special proceedings, it is ordered that remittitur, peremptory writ or judgment issue forthwith, no petition for rehearing will be entertained. In all other cases a petition for rehearing may be filed within 10 days after the decision of the supreme court has been rendered, unless the time is shortened or enlarged by order, and the adverse party shall have 7 days thereafter in which to serve and file his objections thereto. Extensions of time will be granted only upon showing of unusual merit, and in no event in excess of 10 days. A petition for rehearing may be presented upon the following grounds and none other: That some fact, material to the decision, or some question decisive of the case submitted by counsel, was overlooked by the court, or that the decision is in conflict with an express statute or controlling decision to which the attention of the court was not directed. Oral argument in support of the petition will not be permitted. Six copies of the petition and six copies of objections thereto, which may be in typewritten form, shall be filed with the clerk.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966; amd. Sup. Ct. Ord. 10750-7, Sept. 29, 1967, eff. Jan. 1, 1968.

Rule 35. Notice and copy of decision — remittitur — mandate from United States supreme court.

(a) Notice and copy of decision to be furnished. Upon the decision of a cause, notice thereof, together with a copy of the court's written decision, will immediately be mailed to counsel for each party.

(b) Remittitur — when issued — when copy of opinion to accompany. Remittitur may, in cases where it is deemed proper, be ordered forthwith; otherwise the same shall be issued promptly upon expiration of time for filing petition for rehearing, or, if such petition is filed, then upon the denial thereof, unless a modification of the decision is made which permits a further petition for rehearing. A copy of the opinion must accompany the remittitur when the judgment or order of the trial court is reversed or modified and the case remanded for further proceedings other than the entry of a final judgment or order terminating the proceedings in the trial court.

(c) Mandate from United States supreme court — procedure thereon. Upon receipt by the clerk of the supreme court of Montana of a mandate from the supreme court of the United States in any case at law or in equity theretofore taken from the supreme court of Montana to the supreme court of the United States, it shall be the duty of said clerk forthwith to issue under his hand and the seal of the supreme court of Montana a remittitur to the district court by which the judgment was rendered, commanding such court to take such action in the premises as by the mandate shall be proper, and said remittitur shall also contain therein a recital in haec verba of the said mandate, and all the costs subsequent to the appeal from said district court shall be taxed in such remittitur.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 36. Voluntary dismissal.

If the parties to an appeal or other proceeding shall sign and file with the clerk an agreement that the proceeding be dismissed, specifying the terms as to payment of costs, and shall pay whatever fees are due, the clerk shall enter the case dismissed, and shall give to each party a copy of the agreement filed; but no mandate or other process shall issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as to costs as may be agreed upon by the parties or fixed by the court. If an appeal has not been docketed the appeal may be dismissed by the court from which the appeal was taken upon the filing in that court of a stipulation for dismissal signed by all parties, or upon motion and notice by the appellant.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 37. Substitution of parties.

(a) Death of a party. If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the supreme court, the personal representative of the deceased party may be substituted as a party on motion d by the representative or by any party with the clerk of the supreme rt. The motion of a party shall be served upon the representative in ordance with the provisions of Rule 20. If the deceased party has no resentative, any party may suggest the death on the record and proceed- s shall then be had as the supreme court may direct. If a party against om an appeal may be taken dies after entry of a judgment or order in the rict court but before a notice of appeal is filed, an appellant may proceed f death had not occurred. After the notice of appeal is filed substitution ll be effected in the supreme court in accordance with this subdivision. If arty entitled to appeal shall die before filing a notice of appeal, the notice appeal may be filed by his personal representative, or, if he has no per- al representative, by his attorney of record within the time prescribed by se rules. After the notice of appeal is filed substitution shall be effected he supreme court in accordance with this subdivision.

b) Substitution for other causes. If substitution of a party in the reme court is necessary for any reason other than death, substitution shall effected in accordance with the procedure prescribed in subdivision (a).

c) Public officers — death or separation from office.

1) When a public officer is a party to an appeal or other proceeding in supreme court in his official capacity and during its pendency dies, igns or otherwise ceases to hold office, the action does not abate and his cessor is automatically substituted as a party. Proceedings following the stitution shall be in the name of the substituted party, but any misnomer affecting the substantial rights of the parties shall be disregarded. An er of substitution may be entered at any time, but the omission to enter h an order shall not affect the substitution.

2) When a public officer is a party to an appeal or other proceeding he y be described as a party by his official title rather than by name; but the rt may require his name to be added.

istory: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

ule 38. Cases involving constitutional questions where the ate is not a party.

t shall be the duty of counsel who challenges the constitutionality of any of the Montana legislature in any suit or proceeding in the supreme court which the state of Montana, or any agency thereof, or any officer or ployee thereof, as such officer or employee, is not a party, upon the filing the record to give immediate notice in writing to the court of the existence said question, specifying the section of the code or the chapter of the sion law to be construed. The clerk shall thereupon certify such fact to the orney general of the state of Montana.

istory: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

ule 39. Calendar — withdrawal of records.

a) Placing causes upon calendar. Thirty days after the appellant's brief been filed, the cause shall be placed on the calendar as ready for oral ument.

b) Setting causes for argument. As often as found convenient, causes on calendar will be set for argument by the court in the chronological order which they have been placed on the calendar, except such causes as are determined entitled to precedence or as otherwise ordered by the court. Ora arguments will not be heard during the months of July and August.

(c) Advancement of causes. Appeals from orders dissolving, refusing t dissolve, granting or refusing to grant writs of injunction, appeals from order dissolving or refusing to dissolve attachments, appeals from orders appointin or refusing to appoint receivers, appeals from orders or judgments holdin appellant in custody, and workmen's compensation appeals, are entitled t precedence and will, upon motion of either party, be advanced on the calendar.

(d) Permission to take record from clerk's office. The records and othe papers of the supreme court shall not be taken therefrom except by counse pursuant to a written order of a justice of the court, which order shall specif the time the same may be retained out of the clerk's office; provided, tha the court or a justice thereof may require the same to be returned within shorter period upon notice. The clerk shall preserve each order and counsel' receipt until the papers therein mentioned shall be returned.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 40. Appeals from injunction orders.

Upon appeal from an order dissolving or refusing an injunction, if th appellant desires to continue in force the injunction order dissolved by th district court, or to obtain such injunction order pending the appeal, he shal apply to the district court under Rule 62 of the Montana Rules of Civi Procedure. In the event the relief there requested be not granted he may fil in the supreme court his sworn application, setting forth the proceeding appealed from and the relief desired, and present with it to the suprem court, a verified copy of the affidavits or evidence used on the hearing in th district court. Such application will be heard ex parte and without argument and the court, upon such record will make such order in the premises as ma be proper.

History: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

Rule 41. Statutes and rules amended.

[This rule amended Rule 72 of the Montana Rules of Civil Procedure, and Montana Code Annotated, sections 25-9-301, 25-12-101, 25-12-102, 25-33-101 25-33-205(2), 25-33-206, and 70-30-312. For text of amendments see the designated sections.]

Rule 42. Applicability in general.

(a) Special statutory proceedings. The statutory proceedings listed i Table A of the Montana Rules of Civil Procedure and any other special statutory proceedings, whether or not listed in said Table A, are excepted fro these rules insofar as they are inconsistent or in conflict with the procedur and practice provided by these rules.

(b) Appeals to district courts. These rules do not supersede the provisions of statutes relating to appeals to or review by the district courts, whic shall govern procedure and practice relating thereto insofar as they are no inconsistent with these rules.

(c) Rules incorporated into statutes. Where any statute heretofore o hereafter enacted, whether or not applicable to a special statutory proceedin or listed in any table appended hereto, provides that any act in a civil pro ding in a district court or in the Montana supreme court shall be done the manner provided by law or as in a civil action or as provided by any tute superseded by these rules, such act shall be done in accordance with se rules and the procedure thereon shall conform to these rules, insofar practicable.

istory: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

mpiler's Comments

able A. The Code Commissioner has not rinted Table A in the MCA because it s never intended to be a complete listing, s not been updated since 1963, contains a high percentage of repealed sections, and is generally obsolete and not very useful. Interested persons may find it in the 1964 main volume of R.C.M. 1947, Vol. 7.

Rule 43. Title — effective date — statutes superseded.

a) Title. These rules shall be known as the Montana Rules of Appellate il Procedure and may be cited as M.R.App.Civ.P.

b) Effective date and application to pending proceedings. These rules l take effect on January 1, 1966. They govern all appeals and original prodings brought after they take effect, and also all further proceedings in peals and original proceedings then pending, except to the extent that in opinion of the supreme court their application in a particular appeal or ginal proceeding pending when the rules take effect would not be feasible, would work injustice, in which event the procedure existing at the time appeal or original proceeding was brought applies.

c) Statutes and rules superseded. Upon the taking effect of these rules statutes and rules, and parts thereof, in conflict herewith, and the statutes d rules listed in Tables A, B, and C, insofar as they relate to civil proceeds, are superseded in respect of practice and procedure on appeals from the trict courts to the supreme court and in original proceedings brought in supreme court.

istory: En. Sup. Ct. Ord. 11020, Dec. 10, 1965, eff. Jan. 1, 1966.

mpiler's Comments

ables A, B, and C. Tables A, B, and C can be found with the annotations for this rule.

Appendix of Forms

Form 1.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE STATE OF MONTANA FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

IN THE DISTRICT COURT OF THE .... JUDICIAL DISTRICT
OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF ....

B. Plaintiff }
vs. } Notice of Appeal
D. Defendant }

Notice is hereby given that C.D., defendant above-named, hereby appeals the supreme court of the state of Montana (from the final judgment) om the order (describing it)) entered in this action on the .... day of ...., ..

(S) ....
....
Attorney for C.D. (Address)

Form 2.

AFFIDAVIT TO ACCOMPANY MOTION FOR LEAVE TO APPEAL IN FORMA PAUPERIS

IN THE DISTRICT COURT OF THE .... JUDICIAL DISTRICT
OF THE STATE OF MONTANA,
IN AND FOR THE COUNTY OF ....

A.B. Plaintiff
vs.
C.D. Defendant

AFFIDAVIT IN SUPPORT OF APPLICATIO
TO PROCEED ON APPEAL WITHOUT
PREPAYMENT OF COSTS

I, ..., being first duly sworn, depose and say that I am th .... in the above-entitled case; that in support of my application t proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the cost of said proceeding or to give security therefor; that I believe I am entitle to redress; and that the issues which I desire to present on appeal are th following:

....

....

I further swear that the responses which I have made to the questions an instructions below relating to my ability to pay the cost of prosecuting th appeal are true.

1. Are you presently employed?

a. If the answer is yes, state the amount of your salary or wages pe month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and th amount of the salary and wages per month which you received.

2. Have you received within the past 12 months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source?

a. If the answer is yes, describe each source of income, and state th amount received from each during the past 12 months.

3. Do you own any cash or checking or savings account?

a. If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or othe valuable property (excluding ordinary household furnishings and clothing)?

a. If the answer is yes, describe the property and state its approximat value.

5. List the persons who are dependent upon you for support and state you relationship to those persons.

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

....

Subscribed and Sworn to before
me this .... day of ....,
19...

....
Notary Public

et the applicant proceed without
epayment of costs.
....
District Judge

CHAPTERS 22 THROUGH 29

RESERVED

CHAPTER 30

PROCEDURE IN MUNICIPAL COURTS

Part 1 — General Provisions

ection
-30-101. Applicability of district court and justice's court rules.
-30-102. Fees and fines.
-30-103. Summons — time for answer.
-30-104. Reply to counterclaim or new matter.
-30-105. Jury trial.
-30-106. Judgments.
-30-107. Costs.
-30-108. Appeals.

Part 1

General Provisions

25-30-101. Applicability of district court and justice's court ules. (1) The provisions of 3-10-222, 3-10-231 through 3-10-234, 3-10-305, -10-306, 3-10-704 through 3-10-706, 25-31-102(2), 25-31-111, 25-31-114 rough 25-31-116, 25-31-304, 25-31-402(2), 25-31-405, parts 7 through 11 of hapter 31 of this title (except 25-31-701, 25-31-915, 25-31-1002, 25-31-1004, nd 25-31-1005), chapter 33 of this title, chapter 9, part 10 of chapter 16, and art 1 of chapter 17 of Title 27, 27-17-401, and part 15 of chapter 18 of Title 7 are applicable to municipal courts except when they are inconsistent with e provisions of this chapter and chapter 6 of Title 3, the words "municipal ourt" being substituted for justice's court and "judge" for justice of the eace.

(2) Except as otherwise provided by this chapter and chapter 6 of Title , the proceedings and practice in municipal court shall be the same as in istrict court.

History: (1)En. Sec. 11, Ch. 177, L. 1935; re-en. Sec. 5094.11, R.C.M. 1935; amd. Sec. 9, Ch. 344, . 1977; amd. Sec. 8, Ch. 429, L. 1977; Sec. 11-1711, R.C.M. 1947; (2)En. Sec. 20, Ch. 177, L. 1935; -en. Sec. 5094.19, R.C.M. 1935; Sec. 11-1719, R.C.M. 1947; R.C.M. 1947, 11-1711(1), 11-1719(part); nd. Sec. 2, Ch. 409, L. 1979.

25-30-102. Fees and fines. The fees and fines in municipal court shall e the same as the fees and fines provided by law or ordinance, and all fees nd fines collected by the court shall be paid into the city treasury.

History: En. Sec. 18, Ch. 177, L. 1935; re-en. Sec. 5094.18, R.C.M. 1935; amd. Sec. 10, Ch. 429, . 1977; R.C.M. 1947, 11-1718.

25-30-103. Summons — time for answer. The summons in municipal court shall be signed by the clerk and shall conform to the provisions of M.R.Civ.P., Rules 4 and 12(a), except that the time for answering is 10 days.

History: En. Sec. 10, Ch. 177, L. 1935; re-en. Sec. 5094.10, R.C.M. 1935; amd. Sec. 8, Ch. 344, L. 1977; amd. Sec. 7, Ch. 429, L. 1977; R.C.M. 1947, 11-1710.

25-30-104. Reply to counterclaim or new matter. Whenever the answer contains a counterclaim or any new matter, the plaintiff shall within 5 days after the service and filing of the answer reply to the counterclaim or new matter in the manner and form provided for in M.R.Civ.P., Rules 7(a), 8(e)(2), and 10(b).

History: En. Sec. 11, Ch. 177, L. 1935; re-en. Sec. 5094.11, R.C.M. 1935; amd. Sec. 9, Ch. 344, L. 1977; amd. Sec. 8, Ch. 429, L. 1977; R.C.M. 1947, 11-1711(2).

25-30-105. Jury trial. In civil causes arising under the state law, either party shall be entitled to a jury trial, as provided in justices' courts, except that the police officer shall perform the duties thereto prescribed to the sheriff or constable.

History: En. Sec. 15, Ch. 177, L. 1935; re-en. Sec. 5094.15, R.C.M. 1935; R.C.M. 1947, 11-1715(part).

25-30-106. Judgments. In civil causes, judgments in municipal court shall be made and entered as in district court and shall be of like tenor and effect.

History: En. Sec. 12, Ch. 177, L. 1935; re-en. Sec. 5094.12, R.C.M. 1935; R.C.M. 1947, 11-1712.

25-30-107. Costs. The same costs shall be allowed as are allowed in justices' courts and shall be taxed and retaxed as in district court, 24 hours being allowed for filing memorandum of costs.

History: En. Sec. 14, Ch. 177, L. 1935; re-en. Sec. 5094.14, R.C.M. 1935; R.C.M. 1947, 11-1714.

25-30-108. Appeals. (1) A party may appeal to district court from a judgment of municipal court.

(2) Appeal from a municipal court may be limited by requiring by ordinance that a minimum amount in controversy, not to exceed $200, be met before the district court has jurisdiction to hear the appeal, except upon petition by an aggrieved party, the district court may, in the interests of justice, accept appeal jurisdiction notwithstanding the amount in controversy.

History: En. Sec. 17, Ch. 177, L. 1935; re-en. Sec. 5094.17, R.C.M. 1935; amd. Sec. 9, Ch. 429, L. 1977; R.C.M. 1947, 11-1717(part).

CHAPTER 31

PROCEDURE IN JUSTICES' COURTS

Part 1 — General Provisions

Section
25-31-101. Issues which cannot be presented in justice's court.
25-31-102. Transfer to district court — dismissal.
Sections 25-31-103 through 25-31-110 reserved.
25-31-111. What provisions of code applicable to justices' courts.
25-31-112. Fees.

25-31-113. When fees payable.
25-31-114. Depositions.
25-31-115. Deposit of money in lieu of undertaking.
25-31-116. Offer to compromise before trial.

Part 2 — Venue

25-31-201. Venue generally.
25-31-202. Actions based on a contract or other obligation.
25-31-203. Actions for damages for injury to person, property, or reputation.
25-31-204. Actions for the taking of or to recover personal property.
25-31-205. Actions for forcible entry or unlawful detainer.

Part 3 — Change of Venue

25-31-301. When change of venue permitted.
25-31-302. Contents of affidavits.
25-31-303. Limit on number of changes.
25-31-304. When improper venue basis for appeal.
25-31-305. Where action to be transferred.
25-31-306. Papers to be transmitted.
25-31-307. Jurisdiction of transferee court.
25-31-308. Notice of the time and place of trial — pleading.

Part 4 — Commencement of Action—Summons

25-31-401. How action commenced — complaint.
25-31-402. Time for issuing summons — security for costs.
25-31-403. Waiver of summons by defendant.
25-31-404. Form and content of summons.
25-31-405. Designating unknown person as defendant.
25-31-406. Time for answer or appearance.
25-31-407. Where summons may be served.
25-31-408. Who may serve summons — method of service, return.
25-31-409. Alias summons.

Part 5 — Pleadings

25-31-501. Form of pleadings.
25-31-502. Permissible pleadings.
25-31-503. Demurrers abolished.
25-31-504. Complaint.
25-31-505. Answer.
25-31-506. Compulsory counterclaim.
25-31-507. Denial of new matter.
Sections 25-31-508 through 25-31-510 reserved.
25-31-511. Pleading an account or instrument.
25-31-512. Admission of genuineness of signatures.
Sections 25-31-513 through 25-31-520 reserved.
25-31-521. Amendment of pleadings.
25-31-522. Answer to amended pleading.
25-31-523. Variance.

Part 6 — Parties

25-31-601. Who may act as attorney.
25-31-602. When guardian necessary — how appointed.

Part 7 — Time of Trial—Postponements

25-31-701. Fixing day of trial — notice.
25-31-702. Trial to be timely.
25-31-703. Postponement by motion of court.

25-31-704. Postponement by consent of parties.
25-31-705. Postponement upon application of a party — proof required.
25-31-706. No postponement when expected evidence admitted.
25-31-707. Procedure when defendant under arrest.
25-31-708. Deposition of witnesses upon postponement.
25-31-709. Time limit on adjournment — undertaking.

Part 8 — Trial

25-31-801. Issue defined, types of issues.
25-31-802. How issues of fact arise.
25-31-803. By whom issues tried.
25-31-804. Waiver of jury trial.
Sections 25-31-805 through 25-31-810 reserved.
25-31-811. Trial after nonappearance of a party.
25-31-812. Challenges to jurors.

Part 9 — Judgment

25-31-901. Procedure upon default.
25-31-902. Cases treated as a default.
25-31-903. Judgment of dismissal without prejudice.
25-31-904. Entry of judgment.
25-31-905. Judgment when only part of defendants served.
25-31-906. Judgment when amount found due exceeds the jurisdiction of the court.
25-31-907. Judgment when counterclaim has been established.
25-31-908. Judgment when defendant subject to arrest.
Sections 25-31-909 and 25-31-910 reserved.
25-31-911. Abstract of judgment.
25-31-912. Filing and docketing of judgment in district court.
25-31-913. Issuance of execution by clerk of district court.
25-31-914. Lien on real property.
25-31-915. Relief from judgment.

Part 10 — Costs

25-31-1001. Who entitled to costs.
25-31-1002. How costs taxed.
25-31-1003. Costs to be included in judgment.
25-31-1004. Jurors' fees.
25-31-1005. Costs of transferring papers — change of venue.

Part 11 — Execution of Judgment

25-31-1101. When justice may issue execution.
25-31-1102. Form and content of execution.
25-31-1103. Renewal and reissuance of execution.
25-31-1104. Manner of execution.
25-31-1105. Proceedings in aid of execution.
25-31-1106. Discharge of imprisoned judgment debtor.
Sections 25-31-1107 through 25-31-1110 reserved.
25-31-1111. Collection of judgment against county or county officer.

Part 1

General Provisions

25-31-101. Issues which cannot be presented in justice's cour
(1) The parties to an action in a justice's court cannot give evidence upo

any question which involves the title or possession of real property or the legality of any tax, impost, assessment, toll, or municipal fine, nor can any issue presenting such question be tried by such court; provided that, in cases of forcible entry and unlawful detainer of which justices' courts have jurisdiction, any evidence otherwise competent may be given, and any question properly involved therein may be determined.

(2) A justice's court may not hear evidence on or try any issue involving the state's liability to make a payment of money, regardless of the basis of the claim against the state.

History: En. Sec. 593, Bannack Stat.; re-en. Sec. 699, p. 176, Cod. Stat. 1871; re-en. Sec. 759, 1st Div. Rev. Stat. 1879; re-en. Sec. 779, 1st Div. Comp. Stat. 1887; en. Sec. 1486, C. Civ. Proc. 1895; re-en. Sec. 6992, Rev. C. 1907; re-en. Sec. 9625, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 838; re-en. Sec. 9625, R.C.M. 1935; R.C.M. 1947, 93-6607(part); amd. Sec. 4, Ch. 409, L. 1979.

25-31-102. Transfer to district court — dismissal. (1) If it appear from the answer of the defendant, verified by his oath, that the determination of the action will necessarily involve the question of title or possession to real property or the legality of any tax, impost, assessment, toll, or municipal fine, the justice must suspend all further proceedings in the action and certify the pleadings and, if any of the pleadings are oral, a transcript of the same from his docket to the clerk of the district court of the county; and from the time of filing such pleadings or transcript with the clerk, the district court shall have over the action the same jurisdiction as if it had been commenced therein. When the action is certified to the district court, upon the answer of the defendant, he must file an undertaking, to be approved by the justice, to the effect that he will pay all costs that may be awarded against him on the trial in the district court.

(2) If it appears at any point in the proceedings in a justice's court that the determination of the action will involve the question of the state's liability to make a payment of money, the justice shall sever that issue and dismiss the action as to it. If the issue is not severable, the justice shall dismiss the entire action.

History: En. Sec. 593, Bannack Stat.; re-en. Sec. 699, p. 176, Cod. Stat. 1871; re-en. Sec. 759, 1st Div. Rev. Stat. 1879; re-en. Sec. 779, 1st Div. Comp. Stat. 1887; en. Sec. 1486, C. Civ. Proc. 1895; re-en. Sec. 6992, Rev. C. 1907; re-en. Sec. 9625, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 838; re-en. Sec. 9625, R.C.M. 1935; R.C.M. 1947, 93-6607(part); amd. Sec. 5, Ch. 409, L. 1979.

25-31-103 through 25-31-110 reserved.

25-31-111. What provisions of code applicable to justices' courts. Because justices' courts are courts of peculiar and limited jurisdiction, only those provisions of this code which are, in their nature, applicable to the organization, powers, and course of proceedings in justices' courts or which have been made applicable by special provisions in this chapter, chapter 10 of Title 3, 27-9-101, 27-17-102, 27-17-401, and part 10 of chapter 16 and part 15 of chapter 18 of Title 27 are applicable to justices' courts and the proceedings therein.

History: En. Sec. 1686, C. Civ. Proc. 1895; re-en. Sec. 7084, Rev. C. 1907; re-en. Sec. 9717, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 925; re-en. Sec. 9717, R.C.M. 1935; amd. Sec. 52, Ch. 344, L. 1977; R.C.M. 1947, 93-7707.

25-31-112. Fees. The following is the schedule of fees which shall be paid in every civil action in a justice's court:

(1) $5 when complaint is filed, to be paid by the plaintiff;

(2) $5 when the defendant appears, to be paid by the defendant;

(3) $5 to be paid by the prevailing party when judgment is rendered. In cases where judgment is entered by default, no charge except the $5 for the filing of the complaint shall be made for any services, including issuing and return of execution.

(4) $5 for all services in an action where judgment is rendered by confession;

(5) $5 for filing notice of appeal and transcript on appeal, justifying and approving undertaking on appeal, and transmitting papers to the district court with certificate.

History: En. Sec. 4642, Pol. C. 1895; and as Sec. 1, Ch. 52, L. 1903; re-en. Secs. 3175-3176, Rev. C. 1907; superseded by Sec. 1, Ch. 55, L. 1921; re-en. Sec. 4924, R.C.M. 1921; re-en. Sec. 4924, R.C.M. 1935; amd. Sec. 1, Ch. 184, L. 1963; amd. Sec. 3, Ch. 420, L. 1975; amd. Sec. 1, Ch. 154, L. 1977; R.C.M. 1947, 25-301.

25-31-113. When fees payable. All fees must be paid in advance, and no costs shall be included in any judgment until they have been paid. However, nothing herein contained shall restrict or prevent the bringing of suits in forma pauperis as provided by law.

History: En. Sec. 4642, Pol. C. 1895; and as Sec. 1, Ch. 52, L. 1903; re-en. Secs. 3175-3176, Rev. C. 1907; superseded by Sec. 2, Ch. 55, L. 1921; re-en. Sec. 4925, R.C.M. 1921; re-en. Sec. 4925, R.C.M. 1935; R.C.M. 1947, 25-302.

25-31-114. Depositions. Depositions to be used in justices' courts shall be taken as provided in Rules 26 and 28 to 32, inclusive, of the Montana Rules of Civil Procedure.

History: En. Sec. 1691, C. Civ. Proc. 1895; re-en. Sec. 7089, Rev. C. 1907; re-en. Sec. 9722, R.C.M. 1921; re-en. Sec. 9722, R.C.M. 1935; amd. Sec. 1, Ch. 167, L. 1967; R.C.M. 1947, 93-7712.

25-31-115. Deposit of money in lieu of undertaking. In civil cases arising in justices' courts wherein an undertaking is required as prescribed in this code, the plaintiff or defendant may deposit with said justice a sum of money equal to the amount required by said undertaking, which said sum of money shall be taken as security in place of said undertaking.

History: En. Sec. 1687, C. Civ. Proc. 1895; re-en. Sec. 7085, Rev. C. 1907; re-en. Sec. 9718, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 926; re-en. Sec. 9718, R.C.M. 1935; R.C.M. 1947, 93-7708.

25-31-116. Offer to compromise before trial. If the defendant, at any time before the trial, offer in writing to allow judgment to be taken against him for a specified sum, the plaintiff may immediately have judgment therefor, with the costs then accrued; but if he do not accept such offer before the trial and fail to recover in the action a sum in excess of the offer, he cannot recover costs, but costs must be adjudged against him and, if he recover, be deducted from his recovery. The offer and failure to accept cannot be given in evidence or affect the recovery otherwise than as to costs.

History: En. Sec. 611, p. 164, Bannack Stat.; re-en. Sec. 717, p. 180, Cod. Stat. 1871; re-en. Sec. 777, 1st Div. Rev. Stat. 1879; re-en. Sec. 797, 1st Div. Comp. Stat. 1887; amd. Sec. 1628, C. Civ. Proc. 1895; re-en. Sec. 7054, Rev. C. 1907; re-en. Sec. 9687, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 895; re-en. Sec. 9687, R.C.M. 1935; R.C.M. 1947, 93-7309.

Part 2

Venue

25-31-201. Venue generally. Actions in justices' courts may be commenced and, subject to the right to change the place of trial, as provided in part 3 of this chapter, may be tried:

(1) when the defendant is a nonresident of the county, in any county where he may be found and served with summons personally;

(2) when the defendant is a nonresident of the state, in any county of the state;

(3) when the parties voluntarily appear and plead without summons, in any county of the state;

(4) in all other cases, in any county in which the defendant or any one of the defendants, if there be more than one, resides or may be found and served with summons personally.

History: En. Sec. 1480, C. Civ. Proc. 1895; amd. Sec. 1, p. 148, L. 1899; re-en. Sec. 6986, Rev. C. 1907; re-en. Sec. 9619, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 832; re-en. Sec. 9619, R.C.M. 1935; amd. Sec. 15, Ch. 491, L. 1973; R.C.M. 1947, 93-6601(part).

25-31-202. Actions based on a contract or other obligation. When the defendant or all of the defendants, if there be more than one, reside in another county than that in which the right of action accrues and the action be for damages for violation of an express or implied contract or for money due on an express or implied contract, debt, note, or account, the action may be commenced and, subject to the right to change the place of trial, as provided in part 3 of this chapter, may be tried in the county in which such contract or obligation is to be or was to have been performed or such money is to be or was to have been paid or in which the defendant or any one of the defendants resides; and the county in which the obligation is incurred shall be deemed to be the county in which it is to be performed or paid unless there is a special contract to the contrary.

History: En. Sec. 1480, C. Civ. Proc. 1895; amd. Sec. 1, p. 148, L. 1899; re-en. Sec. 6986, Rev. C. 1907; re-en. Sec. 9619, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 832; re-en. Sec. 9619, R.C.M. 1935; amd. Sec. 15, Ch. 491, L. 1973; R.C.M. 1947, 93-6601(part).

25-31-203. Actions for damages for injury to person, property, or reputation. When the defendant or all of the defendants, if there be more than one, reside in another county than that in which the right of action accrues and the action be for damages for injury to person, property, or reputation, the action may be commenced and, subject to the right to change the place of trial, as provided in part 3 of this chapter, may be tried in the county where the injury was committed or in which the defendant or any one of the defendants resides.

History: En. Sec. 1480, C. Civ. Proc. 1895; amd. Sec. 1, p. 148, L. 1899; re-en. Sec. 6986, Rev. C. 1907; re-en. Sec. 9619, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 832; re-en. Sec. 9619, R.C.M. 1935; amd. Sec. 15, Ch. 491, L. 1973; R.C.M. 1947, 93-6601(part).

25-31-204. Actions for the taking of or to recover personal property. In justice's court when the defendant or all the defendants, if there be more than one, reside in another county than that in which the right of action accrues and the action be for the recovery of personal property or the value thereof or damages for taking or detaining the same, the action may be commenced and, subject to the right to change the place of trial, as provided in part 3 of this chapter, may be tried in the county in which the property or any part thereof may be found, in which the property or any part thereof was taken, or in which the defendant or any one of the defendants resides.

History: En. Sec. 1480, C. Civ. Proc. 1895; amd. Sec. 1, p. 148, L. 1899; re-en. Sec. 6986, Rev. C. 1907; re-en. Sec. 9619, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 832; re-en. Sec. 9619, R.C.M. 1935; amd. Sec. 15, Ch. 491, L. 1973; R.C.M. 1947, 93-6601(part).

25-31-205. Actions for forcible entry or unlawful detainer. All actions for the recovery of the possession of real property must be commenced in the county in which the real property, or any part thereof, affected by such action or actions is situated.

History: En. Sec. 43, C. Civ. Proc. 1895; re-en. Sec. 6277, Rev. C. 1907; re-en. Sec. 8831, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 78; R.C.M. 1947, 93-320(part).

Part 3

Change of Venue

25-31-301. When change of venue permitted. The court may, at any time before trial, on motion, change the place of trial in the following cases:

(1) when it appears to the satisfaction of the justice before whom the action is pending, by affidavit of either party, that such justice is a material witness for either party;

(2) when a jury has been demanded and either party makes and files an affidavit that he cannot have a fair and impartial trial on account of the bias or prejudice of the citizens of the county, town, or city against him;

(3) when, from any cause, the justice is disqualified from acting;

(4) when the justice is sick or unable to act.

History: En. Sec. 594, p. 160, Bannack Stat.; re-en. Sec. 700, p. 176, Cod. Stat. 1871; re-en. Sec. 760, 1st Div. Rev. Stat. 1879; re-en. Sec. 780, 1st Div. Comp. Stat. 1887; en. Sec. 1481, C. Civ. Proc. 1895; re-en. Sec. 6987, Rev. C. 1907; re-en. Sec. 9620, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 833; re-en. Sec. 9620, R.C.M. 1935; amd. Sec. 16, Ch. 491, L. 1973; (2)superseded by Sup. Ct. Ord., 34 St. Rep. 26, Dec. 29, 1976; R.C.M. 1947, 93-6602.

25-31-302. Contents of affidavits. The affidavit mentioned in subsections (1) and (2) of 25-31-301 must state the facts.

History: En. Sec. 1482, C. Civ. Proc. 1895; re-en. Sec. 6988, Rev. C. 1907; amd. Sec. 1, Ch. 37, L. 1921; re-en. Sec. 9621, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 834; re-en. Sec. 9621, R.C.M. 1935; R.C.M. 1947, 93-6603(part).

25-31-303. Limit on number of changes. The place of trial cannot be changed on motion of the same party more than once upon any or all the grounds specified in subsections (1) and (2) of 25-31-301.

History: En. Sec. 1482, C. Civ. Proc. 1895; re-en. Sec. 6988, Rev. C. 1907; amd. Sec. 1, Ch. 37, L. 1921; re-en. Sec. 9621, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 834; re-en. Sec. 9621, R.C.M. 1935; R.C.M. 1947, 93-6603(part).

25-31-304. When improper venue basis for appeal. If the objection that the action is brought in the wrong county is taken and overruled, is the cause of a reversal on appeal and does not otherwise invalidate the dgment; if not taken at the trial, it is waived.

istory: En. Sec. 605, p. 163, Bannack Stat.; re-en. Sec. 711, p. 179, Cod. Stat. 1871; re-en. Sec. , 1st Div. Rev. Stat. 1879; re-en. Sec. 791, 1st Div. Comp. Stat. 1887; amd. Sec. 1621, C. Civ. Proc. 5; re-en. Sec. 7047, Rev. C. 1907; re-en. Sec. 9680, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 890; re-en. . 9680, R.C.M. 1935; amd. Sec. 2, Ch. 34, L. 1937; amd. Sec. 19, Ch. 491, L. 1973; R.C.M. 1947, 7302(part).

25-31-305. Where action to be transferred. When the court orders e place of trial to be changed, the action must be transferred for trial to court the parties may agree upon and, if they do not so agree, to another stice's court in the same county.

istory: En. Sec. 1483, C. Civ. Proc. 1895; re-en. Sec. 6989, Rev. C. 1907; re-en. Sec. 9622, .M. 1921; Cal. C. Civ. Proc. Sec. 835; re-en. Sec. 9622, R.C.M. 1935; R.C.M. 1947, 93-6604.

25-31-306. Papers to be transmitted. After an order has been made insferring the action or proceeding to another court for trial, the justice dering the transfer must immediately transmit to the justice of the court which it is transferred, on payment by the party applying of all the costs at have accrued, the pleading and all the papers in the action, together th a certified transcript from his docket of the proceedings therein.

istory: Ap. p. Sec. 1484, C. Civ. Proc. 1895; re-en. Sec. 6990, Rev. C. 1907; re-en. Sec. 9623, .M. 1921; Cal. C. Civ. Proc. Sec. 836; re-en. Sec. 9623, R.C.M. 1935; Sec. 93-6605, R.C.M. 1947; p. Sec. 64, p. 53, L. 1877; re-en. Sec. 64, 1st Div. Rev. Stat. 1879; re-en. Sec. 64, 1st Div. Comp. t. 1887; re-en. Sec. 617, C. Civ. Proc. 1895; re-en. Sec. 6508, Rev. C. 1907; re-en. Sec. 9100, .M. 1921; Cal. C. Civ. Proc. Sec. 399; re-en. Sec. 9100, R.C.M. 1935; amd. Sec. 1, Ch. 176, L. 1; Sec. 93-2908, R.C.M. 1947; R.C.M. 1947, 93-2908(part), 93-6605(part).

25-31-307. Jurisdiction of transferee court. From the time the der changing the place of trial is made, the court to which the action or oceeding is thereby transferred has and exercises the same jurisdiction over as though it had been originally commenced in such court.

istory: Ap. p. Sec. 1485, C. Civ. Proc. 1895; re-en. Sec. 6991, Rev. C. 1907; re-en. Sec. 9624, .M. 1921; Cal. C. Civ. Proc. Sec. 837; re-en. Sec. 9624, R.C.M. 1935; Sec. 93-6606, R.C.M. 1947; p. Sec. 64, p. 53, L. 1877; re-en. Sec. 64, 1st Div. Rev. Stat. 1879; re-en. Sec. 64, 1st Div. Comp. t. 1887; re-en. Sec. 617, C. Civ. Proc. 1895; re-en. Sec. 6508, Rev. C. 1907; re-en. Sec. 9100, .M. 1921; Cal. C. Civ. Proc. Sec. 399; re-en. Sec. 9100, R.C.M. 1935; amd. Sec. 1, Ch. 176, L. 1; Sec. 93-2908, R.C.M. 1947; R.C.M. 1947, 93-2908(part), 93-6606.

25-31-308. Notice of the time and place of trial — pleading. on the receipt by him of such papers, the justice of the court to which the se is transferred must issue a notice stating when and where the trial will ke place, which notice must be served upon the parties at least a day fore the time fixed for trial. If no answer or demurrer has been made by e defendant, he must be allowed to plead.

istory: En. Sec. 1484, C. Civ. Proc. 1895; re-en. Sec. 6990, Rev. C. 1907; re-en. Sec. 9623, .M. 1921; Cal. C. Civ. Proc. Sec. 836; re-en. Sec. 9623, R.C.M. 1935; R.C.M. 1947, 93-6605(2).

Part 4

Commencement of Action — Summons

25-31-401. How action commenced — complaint. An action in a tice's court is commenced by filing a copy of the account, note, bill, bond, or instrument upon which the action is brought, with a statement of the amount due thereon or a concise statement in writing of the cause of action either of which is deemed a complaint.

History: En. Sec. 554, p. 151, Bannack Stat.; re-en. Sec. 660, p. 168, Cod. Stat. 1871; re-en. Sec 720, 1st Div. Rev. Stat. 1879; re-en. Sec. 740, 1st Div. Comp. Stat. 1887; en. Sec. 1500, C. Civ. Proc 1895; re-en. Sec. 6993, Rev. C. 1907; re-en. Sec. 9626, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 839; re-en Sec. 9626, R.C.M. 1935; R.C.M. 1947, 93-6701.

25-31-402. Time for issuing summons — security for costs. (1) The court must endorse on the complaint the date upon which it was filed and at any time within 1 year thereafter the plaintiff may have summons issued.

(2) Justices may, in all cases, require a deposit of money or an undertaking as security for costs of court before issuing a summons.

History: (1)En. Sec. 1501, C. Civ. Proc. 1895; re-en. Sec. 6994, Rev. C. 1907; re-en. Sec. 9627 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 840; re-en. Sec. 9627, R.C.M. 1935; Sec. 93-6702, R.C.M. 1947 (2)En. Sec. 645, p. 171, Bannack Stat.; re-en. Sec. 750, p. 187, Cod. Stat. 1871; re-en. Sec. 810, 1st Div. Rev. Stat. 1879; re-en. Sec. 830, 1st Div. Comp. Stat. 1887; re-en. Sec. 1684, C. Civ. Proc. 1895 re-en. Sec. 7082, Rev. C. 1907; re-en. Sec. 9715, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 923; re-en. Sec 9715, R.C.M. 1935; Sec. 93-7705, R.C.M. 1947; R.C.M. 1947, 93-6702, 93-7705.

25-31-403. Waiver of summons by defendant. At any time after the complaint is filed, the defendant may, in writing or by appearing and pleading, waive the issuing of summons.

History: En. Sec. 1502, C. Civ. Proc. 1895; re-en. Sec. 6995, Rev. C. 1907; re-en. Sec. 9628 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 841; re-en. Sec. 9628, R.C.M. 1935; R.C.M. 1947, 93-6703.

25-31-404. Form and content of summons. The summons must be directed to the defendant and signed by the justice and must contain:

(1) the title of the court, the name of the county and city in which the action is commenced, and the names of the parties thereto;

(2) a sufficient statement of the cause of action, in general terms, to apprise the defendant of the nature of the claim against him, but a copy of the complaint in the action, when served with the copy of the summons upon defendant in lieu of said statement, is sufficient;

(3) a direction that the defendant appear and answer before the justice at his office, as specified in 25-31-406, and that if he fail to appear and answer, judgment will be taken against him according to the complaint.

History: En. Sec. 556, p. 152, Bannack Stat.; re-en. Sec. 662, p. 169, Cod. Stat. 1871; re-en. Sec 722, 1st Div. Rev. Stat. 1879; re-en. Sec. 742, 1st Div. Comp. Stat. 1887; En. Sec. 1505, C. Civ. Proc 1895; re-en. Sec. 6998, Rev. C. 1907; re-en. Sec. 9631, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 844; re-en Sec. 9631, R.C.M. 1935; amd. Sec. 1, Ch. 91, L. 1939; amd. Sec. 17, Ch. 491, L. 1973; R.C.M. 1947 93-6706.

25-31-405. Designating unknown person as defendant. Where the plaintiff is ignorant of the name or part of the name of a defendant, that defendant may be designated in the summons and in any other process or proceeding in the action by a fictitious name or by so much of his name as is known, adding a description identifying the person intended. The person so designated must thereupon be regarded as a defendant in the action and as sufficiently described therein for all purposes. When his name or the remainder of his name is known or becomes known, the justice before whom the action is pending must amend the proceedings already taken by the sertion of the true or full name in place of the fictitious name or part of name, and all subsequent proceedings must be taken under the name so serted.

History: En. Sec. 1692, C. Civ. Proc. 1895; re-en. Sec. 7090, Rev. C. 1907; re-en. Sec. 9723, C.M. 1921; re-en. Sec. 9723, R.C.M. 1935; R.C.M. 1947, 93-7713.

25-31-406. Time for answer or appearance. The time specified in e summons for the appearance of the defendant must be as follows:

(1) if an order of arrest be endorsed upon the summons, forthwith;

(2) in all other cases, the summons shall provide that the defendant shall swer and, if such answer be in writing, file the same and serve a copy ereof upon the plaintiff or his attorney within 6 days after service of this mmons, exclusive of the day of service, and in case of his failure to appear answer, judgment will be taken against him by default for the relief manded in the complaint.

History: En. Sec. 557, p. 152, Bannack Stat.; re-en. Sec. 663, p. 169, Cod. Stat. 1871; re-en. Sec. 3, 1st Div. Rev. Stat. 1879; re-en. Sec. 743, 1st Div. Comp. Stat. 1887; amd. Sec. 1506, C. Civ. Proc. 95; re-en. Sec. 6999, Rev. C. 1907; re-en. Sec. 9632, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 845; re-en. c. 9632, R.C.M. 1935; amd. Sec. 3, Ch. 34, L. 1937; amd. Sec. 1, Ch. 196, L. 1939; R.C.M. 1947, -6707.

25-31-407. Where summons may be served. (1) The summons cant be served out of the county of the justice before whom the action is ought, except:

(a) when the action is brought upon a joint contract or obligation of two more persons who reside in different counties and the summons has been rved upon the defendant resident of the county, in which case the sumons may be served upon the other defendant out of the county;

(b) when an action is brought against a party who has contracted to perrm an obligation at a particular place and resides in a different county, in ich case summons may be served in the county where he resides; and

(c) where an action is brought for an injury to person or property and the fendant resides in a different county, in which case summons may be rved in the county where defendant resides.

(2) When a summons issued by a justice of the peace is to be served out the county in which it was issued, the summons shall have attached to it certificate, under seal by the county clerk of the county in which it was sued, to the effect that the person issuing the same was an acting justice the peace at the date of the summons.

History: (1)En. Sec. 1509, C. Civ. Proc. 1895; re-en. Sec. 7002, Rev. C. 1907; re-en. Sec. 9635, C.M. 1921; Cal. C. Civ. Proc. Sec. 848; re-en. Sec. 9635, R.C.M. 1935; Sec. 93-6710, R.C.M. 1947; En. Sec. 1510, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 61, L. 1903; re-en. Sec. 7003, Rev. C. 1907; en. Sec. 9636, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 849; re-en. Sec. 9636, R.C.M. 1935; amd. Sec. Ch. 110, L. 1967; amd. Sec. 57, Ch. 535, L. 1975; Sec. 93-6711, R.C.M. 1947; R.C.M. 1947, -6710, 93-6711(part).

25-31-408. Who may serve summons — method of service, turn. (1) The summons may be served by a sheriff or constable of any of e counties of this state or by any person resident in the state, 18 years of e or older, not a party to the suit.

(2) The summons must be served and returned as provided in .R.Civ.P., Rule 4D (2), (3), (4), (8), and (9), or it may be served by publition, provided in M.R.Civ.P., Rule 4D (5) and (8), so far as they relate to

publication of summons, are made applicable to justices' courts, the word "justice" being substituted for the word "clerk" whenever the latter word occurs.

(3) Sections 25-3-201(2), 25-3-202, 25-3-204 through 25-3-206, 25-3-301(2) 25-3-302, and 25-10-206 and part 6 of chapter 3 apply to service and return of process in justice's court.

History: (1), (2)En. Sec. 1510, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 61, L. 1903; re-en. Sec. 7003 Rev. C. 1907; re-en. Sec. 9636, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 849; re-en. Sec. 9636, R.C.M 1935; amd. Sec. 1, Ch. 110, L. 1967; amd. Sec. 57, Ch. 535, L. 1975; Sec. 93-6711, R.C.M. 1947 (3)En. by Code Commissioner, 1979; R.C.M. 1947, 93-6711(part).

25-31-409. Alias summons. If the summons is returned without being served upon any or all of the defendants, the justice, upon the demand o the plaintiff, may issue an alias summons in the same form as the original The justice may, within a year from the date of filing the complaint, issue as many alias summonses as may be demanded by the plaintiff.

History: Ap. p. Sec. 1507, C. Civ. Proc. 1895; re-en. Sec. 7000, Rev. C. 1907; re-en. Sec. 9633 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 846; re-en. Sec. 9633, R.C.M. 1935; amd. Sec. 4, Ch. 34, L 1937; Sec. 93-6708, R.C.M. 1947; Ap. p. Sec. 1508, C. Civ. Proc. 1895; re-en. Sec. 7001, Rev. C. 1907 re-en. Sec. 9634, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 847; re-en. Sec. 9634, R.C.M. 1935; Sec 93-6709, R.C.M. 1947; R.C.M. 1947, 93-6708, 93-6709.

Part 5

Pleadings

25-31-501. Form of pleadings. Pleadings in justices' courts:

(1) are not required to be in any particular form but must be such as to enable a person of common understanding to know what is intended;

(2) may, except the complaint, be oral or in writing;

(3) must not be verified unless otherwise provided in this chapter, Title 27, chapter 16, part 10, or Title 27, chapter 9, 17, or 18;

(4) if in writing, must be filed with the justice;

(5) if oral, an entry of their substance must be made in the docket;

(6) in cases of forcible entry and unlawful detainer, must be verified.

History: En. Sec. 1520, C. Civ. Proc. 1895; re-en. Sec. 7005, Rev. C. 1907; re-en. Sec. 9638 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 851; re-en. Sec. 9638, R.C.M. 1935; R.C.M. 1947, 93-6801.

25-31-502. Permissible pleadings. In justice's court, there shall be a complaint and answer, a reply to a counterclaim denominated as such, an answer to a cross-claim, a third-party complaint if a person who is not an original party is brought into the action, and a third-party answer if a third party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

History: En. Sec. 1, Ch. 168, L. 1967; R.C.M. 1947, 93-6802.1.

25-31-503. Demurrers abolished. Demurrers and exceptions fo insufficiency of a pleading shall not be used.

History: En. Sec. 2, Ch. 168, L. 1967; amd. Sec. 16, Ch. 420, L. 1975; R.C.M. 1947, 93-6802.2.

25-31-504. Complaint. The complaint in justices' courts is a concise statement in writing of the facts constituting the plaintiff's cause of action a copy of the account, note, bill, bond, or instrument upon which the tion is based.

History: En. Sec. 1522, C. Civ. Proc. 1895; re-en. Sec. 7007, Rev. C. 1907; re-en. Sec. 9640, C.M. 1921; Cal. C. Civ. Proc. Sec. 853; re-en. Sec. 9640, R.C.M. 1935; R.C.M. 1947, 93-6803.

25-31-505. Answer. The answer may contain a general denial of any all the material facts stated in the complaint which the defendant believes be untrue and also a statement, in a plain and direct manner, of any other cts containing a defense or counterclaim upon which an action might be ought by the defendant against the plaintiff in a justice's court. He may e a copy of an account, note, bill, bond, or other instrument as a counter-im.

History: En. Sec. 1524, C. Civ. Proc. 1895; re-en. Sec. 7009, Rev. C. 1907; re-en. Sec. 9642, C.M. 1921; Cal. C. Civ. Proc. Sec. 855; re-en. Sec. 9642, R.C.M. 1935; R.C.M. 1947, 93-6805.

25-31-506. Compulsory counterclaim. If the defendant omits to set a counterclaim in the cases mentioned in 25-31-505, neither he nor his signee can afterward maintain an action against the plaintiff therefor. If e counterclaim exceeds $300, he need not set it up.

History: En. Sec. 1525, C. Civ. Proc. 1895; re-en. Sec. 7010, Rev. C. 1907; re-en. Sec. 9643, C.M. 1921; Cal. C. Civ. Proc. Sec. 856; re-en. Sec. 9643, R.C.M. 1935; R.C.M. 1947, 93-6806.

25-31-507. Denial of new matter. The new matter contained in the swer or counterclaim is deemed denied by the plaintiff.

History: En. Sec. 1528, C. Civ. Proc. 1895; re-en. Sec. 7013, Rev. C. 1907; re-en. Sec. 9646, C.M. 1921; re-en. Sec. 9646, R.C.M. 1935; R.C.M. 1947, 93-6809.

25-31-508 through 25-31-510 reserved.

25-31-511. Pleading an account or instrument. When the cause of tion or the defense or counterclaim arises upon an account or instrument r the payment of money only, it shall be sufficient for the party to deliver copy of the account or instrument to the party demanding it and to state at there is due to him thereon from the adverse party a specified sum, but e court may, at any time, require the original account or instrument to be hibited to the inspection of the adverse party and a copy to be furnished , if it be not so exhibited and a copy furnished, may prohibit its being terwards given in evidence unless it appear that such instrument is not in e possession of the party pleading it or under his control. The court may, any time, require either party to furnish to the other the items of an count or a bill of particulars.

History: En. Sec. 588, p. 158, Bannack Stat.; re-en. Sec. 694, p. 175, Cod. Stat. 1871; re-en. Sec. 4, 1st Div. Rev. Stat. 1879; re-en. Sec. 774, 1st Div. Comp. Stat. 1887; en. Sec. 1531, C. Civ. Proc. 95; re-en. Sec. 7016, Rev. C. 1907; re-en. Sec. 9649, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 886; re-en. c. 9649, R.C.M. 1935; R.C.M. 1947, 93-6812.

25-31-512. Admission of genuineness of signatures. If the plain-f annex to his complaint or file with the justice at the time of issuing the mmons a copy of the promissory note, bill of exchange, other obligation for e payment of money, or other instrument upon which the action is ought, the defendant shall be deemed to admit the genuineness of all the signatures thereto unless he specifically deny the same in his answer under oath. In case of a counterclaim, the same rule applies to the plaintiff.

History: En. Sec. 589, p. 159, Bannack Stat.; re-en. Sec. 695, p. 175, Cod. Stat. 1871; re-en. Sec. 755, 1st Div. Rev. Stat. 1879; re-en. Sec. 775, 1st Div. Comp. Stat. 1887; amd. Sec. 1532, C. Civ. Proc. 1895; re-en. Sec. 7017, Rev. C. 1907; re-en. Sec. 9650, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 887; re-en. Sec. 9650, R.C.M. 1935; R.C.M. 1947, 93-6813.

25-31-513 through 25-31-520 reserved.

25-31-521. Amendment of pleadings. Either party may, at any time before the conclusion of the trial, amend any pleading; but if the amendment is made after the issue and it appears to the satisfaction of the court, by oath, that an adjournment is necessary to the adverse party in consequence of such amendment, an adjournment must be granted. When an adjournment will be rendered necessary by the amendment, the court may also, in its discretion, require as a condition to the allowance of such amendment, made after issue joined, the payment of costs to the adverse party, to be fixed by the court, not exceeding $20.

History: En. Sec. 1529, C. Civ. Proc. 1895; re-en. Sec. 7014, Rev. C. 1907; re-en. Sec. 9647, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 859; re-en. Sec. 9647, R.C.M. 1935; R.C.M. 1947, 93-6810(part).

25-31-522. Answer to amended pleading. When a pleading is amended, the adverse party may answer it within such time, not exceeding 2 days, as the court may allow.

History: En. Sec. 1530, C. Civ. Proc. 1895; re-en. Sec. 7015, Rev. C. 1907; re-en. Sec. 9648, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 860; re-en. Sec. 9648, R.C.M. 1935; amd. Sec. 15, Ch. 420, L. 1975; R.C.M. 1947, 93-6811.

25-31-523. Variance. A variance between the proof on the trial and the allegations in pleading shall be disregarded as immaterial unless the court be satisfied that the adverse party has been misled to his prejudice thereby.

History: En. Sec. 591, p. 159, Bannack Stat.; re-en. Sec. 697, p. 176, Cod. Stat. 1871; re-en. Sec. 757, 1st Div. Rev. Stat. 1879; re-en. Sec. 777, 1st Div. Comp. Stat. 1887; re-en. Sec. 1533, C. Civ. Proc. 1895; re-en. Sec. 7018, Rev. C. 1907; re-en. Sec. 9651, R.C.M. 1921; re-en. Sec. 9651, R.C.M. 1935; R.C.M. 1947, 93-6814.

Part 6

Parties

25-31-601. Who may act as attorney. Parties in justice's court may appear and act in person or by attorney; and any person, except the constable by whom the summons or jury process was served, may act as attorney.

History: En. Sec. 551, p. 151, Bannack Stat.; re-en. Sec. 657, p. 167, Cod. Stat. 1871; re-en. Sec. 717, 1st Div. Rev. Stat. 1879; re-en. Sec. 737, 1st Div. comp. Stat. 1887; amd. Sec. 1503, C. Civ. Proc. 1895; re-en. Sec. 6996, Rev. C. 1907; re-en. Sec. 9629, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 842; re-en. Sec. 9629, R.C.M. 1935; R.C.M. 1947, 93-6704.

25-31-602. When guardian necessary — how appointed. When an infant, insane, or incompetent person is a party, he must appear either by his general guardian, if he have one, or by a guardian ad litem appointed by the justice. When a guardian ad litem is appointed by the justice, he must be appointed as follows:

(1) If the infant, insane, or incompetent person be plaintiff, the appoint-
ent must be made before the summons is issued:
(a) upon the application of the infant, if he be of the age of 14 years;
(b) if under that age or if insane or incompetent, upon the application of
relative or friend.
(2) If the infant, insane, or incompetent person be defendant, the
pointment must be made at the time the summons is returned or before
e answer:
(a) upon the application of the infant, if he be of the age of 14 years and
ply at the time or before the summons is returned;
(b) if he be under the age of 14 years or be insane or incompetent or
glect so to apply, then upon the application of a relative or friend or any
her party to the action, or by the justice, on his own motion.

istory: En. Sec. 555, p. 151, Bannack Stat.; re-en. Sec. 661, p. 169, Cod. Stat. 1871; re-en. Sec. l, 1st Div. Rev. Stat. 1879; re-en. Sec. 741, 1st Div. Comp. Stat. 1887; en. Sec. 1504, C. Civ. Proc. 5; re-en. Sec. 6997, Rev. C. 1907; re-en. Sec. 9630, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 843; re-en. . 9630, R.C.M. 1935; R.C.M. 1947, 93-6705.

Part 7

Time of Trial — Postponements

25-31-701. Fixing day of trial — notice. When all parties served
th process shall have appeared or some of them have appeared and the
maining defendants have made default, the justice must fix a day for the
al of said cause and notify the plaintiffs and the defendants who have
peared thereof.

istory: En. Sec. 1511, C. Civ. Proc. 1895; re-en. Sec. 7004, Rev. C. 1907; re-en. Sec. 9637, .M. 1921; Cal. C. Civ. Proc. Sec. 850; re-en. Sec. 9637, R.C.M. 1935; amd. Sec. 5, Ch. 34, L. 7; R.C.M. 1947, 93-6712.

25-31-702. Trial to be timely. Unless postponed as provided in this
rt or transferred to another court, the trial of the action may commence
the time set by the court as specified in the notice mentioned in
-31-701, and after the trial has commenced there must be no adjournment
more than 24 hours at any one time until all the issues therein are dis-
sed of.

istory: En. Sec. 1590, C. Civ. Proc. 1895; re-en. Sec. 7033, Rev. C. 1907; re-en. Sec. 9666, .M. 1921; Cal. C. Civ. Proc. Sec. 873; re-en. Sec. 9666, R.C.M. 1935; R.C.M. 1947, 93-7101; amd. . 1, Ch. 125, L. 1979.

25-31-703. Postponement by motion of court. The court may, of
own motion, postpone the trial:
1) for not exceeding 1 day if, at the time fixed by law or by an order
the court for the trial, the court is engaged in the trial of another action;
2) for not exceeding 2 days if, by an amendment of the pleadings or the
owance of time to make such amendment or to plead, a postponement is
dered necessary;
3) for not exceeding 3 days if the trial is upon issues of fact and a jury
been demanded.

istory: En. Sec. 1591, C. Civ. Proc. 1895; re-en. Sec. 7034, Rev. C. 1907; re-en. Sec. 9667, .M. 1921; Cal. C. Civ. Proc. Sec. 874; re-en. Sec. 9667, R.C.M. 1935; R.C.M. 1947, 93-7102.

25-31-704. Postponement by consent of parties. The court ma by the consent of the parties given in writing or in open court, postpone th trial to a time agreed upon by the parties.

History: En. Sec. 1592, C. Civ. Proc. 1895; re-en. Sec. 7035, Rev. C. 1907; re-en. Sec. 966 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 875; re-en. Sec. 9668, R.C.M. 1935; R.C.M. 1947, 93-7103.

25-31-705. Postponement upon application of a party — proo required. The trial may be postponed upon the application of either part for a period not exceeding 4 months. The party making the application mus prove, by his own oath or otherwise, that he cannot, for want of materi testimony which he expects to procure, safely proceed to trial and must sho in what respect the testimony expected is material and that he has used du diligence to procure it and has been unable to do so.

History: En. Sec. 596, p. 161, Bannack Stat.; re-en. Sec. 702, p. 177, Cod. Stat. 1871; re-en. Se 762, 1st Div. Rev. Stat. 1879; re-en. Sec. 782, 1st Div. Comp. Stat. 1887; en. Sec. 1593, C. Civ. Pro 1895; re-en. Sec. 7036, Rev. C. 1907; re-en. Sec. 9669, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 876; re-e Sec. 9669, R.C.M. 1935; R.C.M. 1947, 93-7104(part).

25-31-706. No postponement when expected evidence admitte The court may require the party making the application to state, upon affidavit, the evidence which he expects to obtain; and if the adverse part thereupon admit that such evidence would be given and that it be considere as actually given on the trial or offered and overruled as improper, the tri must not be postponed.

History: En. Sec. 596, p. 161, Bannack Stat.; re-en. Sec. 702, p. 177, Cod. Stat. 1871; re-en. Se 762, 1st Div. Rev. Stat. 1879; re-en. Sec. 782, 1st Div. Comp. Stat. 1887; en. Sec. 1593, C. Civ. Pro 1895; re-en. Sec. 7036, Rev. C. 1907; re-en. Sec. 9669, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 876; re-e Sec. 9669, R.C.M. 1935; R.C.M. 1947, 93-7104(part).

25-31-707. Procedure when defendant under arrest. (1) If th application is on the part of the plaintiff and the defendant is under arres a postponement for more than 3 hours discharges the defendant from custody; but the action may proceed, notwithstanding, and the defendant is subject to arrest on execution in the same manner as if he had not bee discharged.

(2) If the application is on the part of a defendant under arrest, befo it can be granted he must execute an undertaking, with two or more suff cient sureties to be approved by and in a sum to be fixed by the justice, t the effect that he will render himself amenable to the process of the cou during the pendency of the action and to such as may be issued to enfor the judgment therein, or that the sureties will pay to the plaintiff the amou of any judgment which he may recover in the action, not exceeding t amount specified in the undertaking. On filing the undertaking specified i this subsection, the justice may order the defendant discharged from custod

History: En. Sec. 596, p. 161, Bannack Stat.; re-en. Sec. 702, p. 177, Cod. Stat. 1871; re-en. S 762, 1st Div. Rev. Stat. 1879; re-en. Sec. 782, 1st Div. Comp. Stat. 1887; en. Sec. 1593, C. Civ. Pr 1895; re-en. Sec. 7036, Rev. C. 1907; re-en. Sec. 9669, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 876; re- Sec. 9669, R.C.M. 1935; R.C.M. 1947, 93-7104(2), (3).

25-31-708. Deposition of witnesses upon postponement. T party making the application must, if required by the adverse party, conse that the testimony of any witness of such adverse party who is in attenda may be then taken by deposition before the justice and that the testimo o taken may be read on trial with the same effect and subject to the objections as if the witness were produced.

History: En. Sec. 596, p. 161, Bannack Stat.; re-en. Sec. 702, p. 177, Cod. Stat. 1871; re-en. Sec. 62, 1st Div. Rev. Stat. 1879; re-en. Sec. 782, 1st Div. Comp. Stat. 1887; en. Sec. 1593, C. Civ. Proc. 895; re-en. Sec. 7036, Rev. C. 1907; re-en. Sec. 9669, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 876; re-en. ec. 9669, R.C.M. 1935; R.C.M. 1947, 93-7104(part).

25-31-709. Time limit on adjournment — undertaking. No djournment must, unless by consent, be granted for a period longer than 10 ays upon the application of either party except upon condition that such arty file an undertaking, in an amount fixed by the justice, with two sureies to be approved by the justice, to the effect that they will pay to the pposite party the amount of any judgment which may be recovered against he party applying, not exceeding the sum specified in the undertaking.

History: En. Sec. 598, p. 162, Bannack Stat.; re-en. Sec. 704, p. 178, Cod. Stat. 1871; re-en. Sec. 64, 1st Div. Rev. Stat. 1879; re-en. Sec. 784, 1st Div. Comp. Stat. 1887; amd. Sec. 1594, C. Civ. Proc. 895; re-en. Sec. 7037, Rev. C. 1907; re-en. Sec. 9670, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 877; re-en. ec. 9670, R.C.M. 1935; R.C.M. 1947, 93-7105.

Part 8

Trial

25-31-801. Issue defined, types of issues. Issues arise upon the leadings when a fact or conclusion of law is maintained by the one party nd is controverted by the other. They are of two kinds:

(1) of law; and

(2) of fact.

History: En. Sec. 1600, C. Civ. Proc. 1895; re-en. Sec. 7038, Rev. C. 1907; re-en. Sec. 9671, .C.M. 1921; Cal. C. Civ. Proc. Sec. 878; re-en. Sec. 9671, R.CM. 1935; R.C.M. 1947, 93-7201.

25-31-802. How issues of fact arise. An issue of fact arises:

(1) upon a material allegation in the complaint controverted by the nswer; and

(2) upon new matter in the answer, except an issue of law is joined hereon.

History: En. Sec. 1602, C. Civ. Proc. 1895; re-en. Sec. 7040, Rev. C. 1907; re-en. Sec. 9673, .C.M. 1921; Cal. C. Civ. Proc. Sec. 880; re-en. Sec. 9673, R.C.M. 1935; R.C.M. 1947, 93-7203.

25-31-803. By whom issues tried. (1) An issue of law must be tried y the court.

(2) An issue of fact must be tried by a jury unless a jury is waived, in hich case it must be tried by the court.

History: En. Secs. 1603, 1604, C. Civ. Proc. 1895; re-en. Secs. 7041, 7042, Rev. C. 1907; re-en. ecs. 9674, 9675, R.C.M. 1921; Cal. C. Civ. Proc. Secs. 881, 882; re-en. Secs. 9674, 9675, R.C.M. 935; R.C.M. 1947, 93-7204, 93-7205.

25-31-804. Waiver of jury trial. A jury may be waived by:

(1) consent of parties entered in the docket;

(2) a failure of either party to demand a jury before the commencement f the trial of an issue of fact;

(3) the failure of either party to appear at the time fixed for the trial of n issue of fact.

History: En. Sec. 1605, C. Civ. Proc. 1895; re-en. Sec. 7043, Rev. C. 1907; re-en. Sec. 9676, .C.M. 1921; Cal. C. Civ. Proc. Sec. 883; re-en. Sec. 9676, R.C.M. 1935; R.C.M. 1947, 93-7206.

25-31-805 through 25-31-810 reserved.

25-31-811. Trial after nonappearance of a party. If either party fails to appear at the time fixed for trial, the trial may proceed at the request of the adverse party.

History: En. Sec. 600, p. 162, Bannack Stat.; re-en. Sec. 706, p. 178, Cod. Stat. 1871; re-en. Sec. 766, 1st Div. Rev. Stat. 1879; re-en. Sec. 786, 1st Div. Comp. Stat. 1887; amd. Sec. 1606, C. Civ. Proc. 1895; re-en. Sec. 7044, Rev. C. 1907; re-en. Sec. 9677, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 884; re-en. Sec. 9677, R.C.M. 1935; R.C.M. 1947, 93-7207.

25-31-812. Challenges to jurors. The challenges are either peremptory or for cause:

(1) Each party is entitled to two peremptory challenges. They shall be exercised by the plaintiff first striking one and the defendant then striking one, and so on until each side has exhausted or waived his rights.

(2) Either party may challenge for cause on any grounds set forth in 25-7-223. Challenges for cause must be tried by the justice.

History: Ap. p. Sec. 604, p. 162, Bannack Stat.; re-en. Sec. 710, p. 178, Cod. Stat. 1871; re-en. Sec. 770, 1st Div. Rev. Stat. 1879; re-en. Sec. 790, 1st Div. Comp. Stat. 1887; amd. Sec. 1607, C. Civ. Proc. 1895; re-en. Sec. 7045, Rev. C. 1907; re-en. Sec. 9678, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 885; re-en. Sec. 9678, R.C.M. 1935; Sec. 93-7208, R.C.M. 1947; Ap. p. Sec. 224, C. Civ. Proc. 1895; re-en. Sec. 6334, Rev. C. 1907; re-en. Sec. 8887, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 194; re-en. Sec. 8887, R.C.M. 1935; amd. Sec. 4, Ch. 203, L. 1939; amd. Sec. 1, Ch. 293, L. 1971; Sec. 93-1205 R.C.M. 1947; R.C.M. 1947, 93-1205(part), 93-7208.

Part 9

Judgment

25-31-901. Procedure upon default. If the defendant fails to appear answer, or demur within the time specified in the summons, then the defendant shall be in default and his default shall be entered accordingly by the court. Evidence may then be submitted and judgment rendered and entered in accordance with the statement in the summons or as prayed for in the complaint at any time within 90 days from the date of the entry of such default of the defendant.

History: En. Sec. 1580, C. Civ. Proc. 1895; re-en. Sec. 7031, Rev. C. 1907; re-en. Sec. 9664 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 871; re-en. Sec. 9664, R.C.M. 1935; amd. Sec. 1, Ch. 34, L 1937; amd. Sec. 2, Ch. 91, L. 1939; R.C.M. 1947, 93-7001.

25-31-902. Cases treated as a default. In the following cases the same proceedings must be had and judgment must be rendered in like manner as if the defendant had failed to appear and answer or demur:

(1) if the complaint has been amended and the defendant fails to answer it as amended within the time allowed by the court;

(2) if the demurrer to the complaint is overruled and the defendant fails to answer at once;

(3) if the demurrer to the answer is sustained and the defendant fails to amend the answer within the time allowed by the court.

History: En. Sec. 1581, C. Civ. Proc. 1895; re-en. Sec. 7032, Rev. C. 1907; re-en. Sec. 9665 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 872; re-en. Sec. 9665, R.C.M. 1935; R.C.M. 1947, 93-7002.

25-31-903. Judgment of dismissal without prejudice. Judgment that the action be dismissed without prejudice to a new action may be entered with costs in the following cases:

(1) when the plaintiff voluntarily dismisses the action, at or before the ose of his evidence, when there is no counterclaim;

(2) when he fails to appear at any time within 5 days after default has een entered or at the time to which the action has been postponed;

(3) when, after a demurrer to the complaint has been sustained, the aintiff fails to amend it within the time allowed by the court;

(4) when it is objected at the trial and appears by the evidence that the ction is brought in the wrong county.

History: En. Sec. 605, p. 163, Bannack Stat.; re-en. Sec. 711, p. 179, Cod. Stat. 1871; re-en. Sec. 1, 1st Div. Rev. Stat. 1879; re-en. Sec. 791, 1st Div. Comp. Stat. 1887; amd. Sec. 1621, C. Civ. Proc. 95; re-en. Sec. 7047, Rev. C. 1907; re-en. Sec. 9680, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 890; re-en. c. 9680, R.C.M. 1935; amd. Sec. 2, Ch. 34, L. 1937; amd. Sec. 19, Ch. 491, L. 1973; R.C.M. 1947, -7302(part).

25-31-904. Entry of judgment. When a trial by jury has been had, dgment must be entered by the justice, at once, in conformity with the erdict. When the trial is by the court, judgment must be entered at the ose of the trial.

History: En. Sec. 608, p. 163, Bannack Stat.; re-en. Sec. 714, p. 180, Cod. Stat. 1871; re-en. Sec. 4, 1st Div. Rev. Stat. 1879; re-en. Sec. 794, 1st Div. Comp. Stat. 1887; amd. Secs. 1622, 1623, C. v. Proc. 1895; re-en. Secs. 7048, 7049, Rev. C. 1907; re-en. Secs. 9681, 9682, R.C.M. 1921; Cal. Civ. Proc. Secs. 891, 892; re-en. Secs. 9681, 9682, R.C.M. 1935; R.C.M. 1947, 93-7303, 93-7304.

25-31-905. Judgment when only part of defendants served. If e action be on a contract against two or more defendants and the summons e served on one or more but not on all:

(1) the judgment shall be entered up only against those who were served the contract be a several or a joint and several contract; but

(2) if the contract be a joint contract only, the judgment shall be entered against all the defendants but shall only be enforced against the joint roperty of all and the separate property of the defendants served.

History: En. Sec. 610, p. 163, Bannack Stat.; re-en. Sec. 715, p. 180, Cod. Stat. 1871; re-en. Sec. 5, 1st Div. Rev. Stat. 1879; re-en. Sec. 795, 1st Div. Comp. Stat. 1887; re-en. Sec. 1625, C. Civ. oc. 1895; re-en. Sec. 7051, Rev. C. 1907; re-en. Sec. 9684, R.C.M. 1921; re-en. Sec. 9684, R.C.M. 35; R.C.M. 1947, 93-7306.

25-31-906. Judgment when amount found due exceeds the risdiction of the court. When the amount found due to either party ceeds the sum for which the justice is authorized to enter judgment, such arty may remit the excess and judgment may be entered for the residue.

History: En. Sec. 610, p. 163, Bannack Stat.; re-en. Sec. 716, p. 180, Cod. Stat. 1871; re-en. Sec. 6, 1st Div. Rev. Stat. 1879; re-en. Sec. 796, 1st Div. Comp. Stat. 1887; re-en. Sec. 1626, C. Civ. oc. 1895; re-en. Sec. 7052, Rev. C. 1907; re-en. Sec. 9685, R.C.M. 1921; Cal. C. Civ. Pro. Sec. 894; -en. Sec. 9685, R.C.M. 1935; R.C.M. 1947, 93-7307.

25-31-907. Judgment when counterclaim has been established. Where a counterclaim is established which equals the plaintiff's demand, the dgment must be in favor of the defendant. Where it is less than the laintiff's demand, the plaintiff must have judgment for the residue only. Where it exceeds the plaintiff's demand, the defendant must have judgment r the excess.

History: En. Sec. 1627, C. Civ. Proc. 1895; re-en. Sec. 7053, Rev. C. 1907; re-en. Sec. 9686, C.M. 1921; re-en. Sec. 9686, R.C.M. 1935; R.C.M. 1947, 93-7308.

25-31-908. Judgment when defendant subject to arrest. When the judgment is rendered in a case where the defendant is subject to arrest and imprisonment thereon, the fact that the defendant is so subject must be stated in the judgment.

History: En. Sec. 612, p. 164, Bannack Stat.; re-en. Sec. 718, p. 179, Cod. Stat. 1871; re-en. Sec 778, 1st Div. Rev. Stat. 1879; re-en. Sec. 798, 1st Div. Comp. Stat. 1887; amd. Sec. 1624, C. Civ. Proc 1895; re-en. Sec. 7050, Rev. C. 1907; re-en. Sec. 9683, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 893; re-en Sec. 9683, R.C.M. 1935; R.C.M. 1947, 93-7305(part).

25-31-909 and 25-31-910 reserved.

25-31-911. Abstract of judgment. The justice, on the demand of a party in whose favor judgment is rendered, must give him an abstract of the judgment in substantially the following form (filling blanks according to the facts):

“State of Montana
County of ....

...., plaintiff
vs.
...., defendant

In justice’s court, before ...., justice of the peace, ... County, ..., 19.. (inserting date of abstract). Judgment entered for plaintiff (or defendant) for $.... on the .... day of ....., I certify that the foregoing is a correct abstract of a judgment rendered in said action in my court [or (as the case may be) in the court of ...., justice of the peace, as it appears by his docket now in my possession as his successor in office].

...., Justice of the Peace.”

History: En. Sec. 614, p. 164, Bannack Stat.; re-en. Sec. 720, p. 180, Cod. Stat. 1871; amd. Sec 1, p. 38, L. 1876; re-en. Sec. 780, p. 184, 1st Div. Rev. Stat. 1879; re-en. Sec. 800, 1st Div. Comp Stat. 1887; en. Sec. 1630, C. Civ. Proc. 1895; re-en. Sec. 7056, Rev. C. 1907; re-en. Sec. 9689, R.C.M 1921; Cal. C. Civ. Proc. Sec 897; re-en. Sec. 9689, R.C.M. 1935; amd. Sec. 20, Ch. 491, L. 1973 R.C.M. 1947, 93-7311.

25-31-912. Filing and docketing of judgment in district court The abstract may be filed in the office of the clerk of the district court o the county in which the judgment was rendered and the judgment docketed in the judgment docket of the district court thereof. The time of the receip of the abstract by the clerk must be noted by him thereon and entered in the docket.

History: En. Sec. 614, p. 164, Bannack Stat.; re-en. Sec. 720, p. 180, Cod. Stat. 1871; amd. Sec 1, p. 38, L. 1876; re-en. Sec. 780, p. 184, 1st Div. Rev. Stat. 1879; re-en. Sec. 800, 1st Div. Comp Stat. 1887; en. Sec. 1631, C. Civ. Proc. 1895; re-en. Sec. 7057, Rev. C. 1907; re-en. Sec. 9690, R.C.M 1921; Cal. C. Civ. Proc. Sec. 898; re-en. Sec. 9690, R.C.M. 1935; R.C.M. 1947, 93-7312.

25-31-913. Issuance of execution by clerk of district court From the time of docketing in the clerk’s office, execution may be issued thereon by the clerk to the sheriff of any county in the state in the same manner and with like effect as if issued on a judgment of the district court.

History: En. Sec. 614, p. 164, Bannack Stat.; re-en. Sec. 720, p. 180, Cod. Stat. 1871; amd. Sec 1, p. 38, L. 1876; re-en. Sec. 780, p. 184, 1st Div. Rev. Stat. 1879; re-en. Sec. 800, 1st Div. Comp Stat. 1887; en. Sec. 1632, C. Civ. Proc. 1895; amd. Sec. 1, p. 242, L. 1897; re-en. Sec. 7058, Rev C. 1907; re-en. Sec. 9691, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 899; re-en. Sec. 9691, R.C.M. 1935 R.C.M. 1947, 93-7313.

25-31-914. Lien on real property. The judgment rendered in a stice's court creates no lien upon any lands of the defendant unless such bstract is filed as aforesaid in the office of the clerk of the district court the county in which the lands are situated. When so filed and from the me of filing, the judgment becomes a lien upon all real property of the dgment debtor, not exempt from execution, in such county, owned by him the time or which he may afterwards and before the lien expires acquire. he lien continues for 6 years unless the judgment be previously satisfied.

History: En. Sec. 614, p. 164, Bannack Stat.; re-en. Sec. 720, p. 180, Cod. Stat. 1871; amd. Sec. p. 38, L. 1876; re-en. Sec. 780, p. 184, 1st Div. Rev. Stat. 1879; re-en. Sec. 800, 1st Div. Comp. at. 1887; en. Sec. 1633, C. Civ. Proc. 1895; amd. Sec. 2, p. 243, L. 1897; re-en. Sec. 7059, Rev. 1907; re-en. Sec. 9692, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 900; re-en. Sec. 9692, R.C.M. 1935; .C.M. 1947, 93-7314.

25-31-915. Relief from judgment. The court may, on such terms as ay be just and on the payment of costs, relieve a party from any judgment aken against him by mistake, inadvertence, surprise, or excusable neglect, ut the application for such relief must be made within 10 days after the ntry of the judgment and upon an affidavit showing good cause therefor.

History: En. Sec. 1529, C. Civ. Proc. 1895; re-en. Sec. 7014, Rev. C. 1907; re-en. Sec. 9647, .C.M. 1921; Cal. C. Civ. Proc. Sec. 859; re-en. Sec. 9647, R.C.M. 1935; R.C.M. 1947, 93-6810(part).

Part 10

Costs

25-31-1001. Who entitled to costs. The prevailing party in justices' ourts is entitled to costs of the action and also of all proceedings taken by im in aid of execution issued upon any judgment recovered therein.

History: En. Sec. 1685, C. Civ. Proc. 1895; re-en. Sec. 7083, Rev. C. 1907; re-en. Sec. 9716, .C.M. 1921; Cal. C. Civ. Proc. Sec. 924; amd. Sec. 19, Ch. 177, L. 1935; re-en. Sec. 9716, R.C.M. 35; amd. Sec. 1, Ch. 156, L. 1937; R.C.M. 1947, 93-7706.

25-31-1002. How costs taxed. In a justice's or city court, no cost bill eed be filed, but the justice or judge must tax the same and make an itemzed statement of all the costs incurred by each party in his docket.

History: En. Sec. 1868, C. Civ. Proc. 1895; re-en. Sec. 7171, Rev. C. 1907; re-en. Sec. 9804, .C.M. 1921; re-en. Sec. 9804, R.C.M. 1935; R.C.M. 1947, 93-8620(part).

25-31-1003. Costs to be included in judgment. The justice must ax and include in the judgment the costs allowed by law to the prevailing arty.

History: En. Sec. 643, p. 171, Bannack Stat.; re-en. Sec. 748, p. 186, Cod. Stat. 1871; re-en. Sec. 08, 1st Div. Rev. Stat. 1879; re-en. Sec. 828, 1st Div. Comp. Stat. 1887; re-en. Sec. 1629, C. Civ. roc. 1895; re-en. Sec. 7055, Rev. C. 1907; re-en. Sec. 9688, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 96; re-en. Sec. 9688, R.C.M. 1935; R.C.M. 1947, 93-7310.

25-31-1004. Jurors' fees. In justices' and city courts, the fees paid to rors must be taxed against the unsuccessful party.

History: En. Sec. 1868, C. Civ. Proc. 1895; re-en. Sec. 7171, Rev. C. 1907; re-en. Sec. 9804, .C.M. 1921; re-en. Sec. 9804, R.C.M. 1935; R.C.M. 1947, 93-8620(part).

25-31-1005. Costs of transferring papers — change of venue. he costs and fees of transmitting the pleading and papers when an order is made transferring an action or proceeding for trial and of filing the papers anew must be paid by the party at whose instance the order was made; except that the party filing the complaint must pay all costs and fees of filing the papers anew and all costs and fees, including reasonable attorneys' fees to be fixed by the court, incurred by the defendant by reason of the change of venue motion and hearing when:

(1) the action is an action upon a contract, express or implied, for the direct payment of money and no claim contained in the complaint exceeds $1,000;

(2) the county designated in the complaint is not the proper county; and

(3) the plaintiff will not within 10 days after request stipulate for change of venue and defendant files a motion for such change and such motion is thereafter granted.

History: En. Sec. 64, p. 53, L. 1877; re-en. Sec. 64, 1st Div. Rev. Stat. 1879; re-en. Sec. 64, 1st Div. Comp. Stat. 1887; re-en. Sec. 617, C. Civ. Proc. 1895; re-en. Sec. 6508, Rev. C. 1907; re-en. Sec. 9100, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 399; re-en. Sec. 9100, R.C.M. 1935; amd. Sec. 1, Ch. 176, L. 1971; R.C.M. 1947, 93-2908(part).

Part 11

Execution of Judgment

25-31-1101. When justice may issue execution. Execution for the enforcement of a judgment of a justice's court may be issued by the justice who entered the judgment or his successor in office, on the application of the party entitled thereto, at any time within 5 years from the entry of judgment.

History: En. Sec. 615, p. 165, Bannack Stat.; re-en. Sec. 721, p. 181, Cod. Stat. 1871; re-en. Sec. 781, 1st Div. Rev. Stat. 1879; re-en. Sec. 801, 1st Div. Comp. Stat. 1887; amd. Sec. 1640, C. Civ. Proc. 1895; re-en. Sec. 7060, Rev. C. 1907; amd. Sec. 1, Ch. 38, L. 1921; re-en. Sec. 9693, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 901; re-en. Sec. 9693, R.C.M. 1935; R.C.M. 1947, 93-7401.

25-31-1102. Form and content of execution. The execution must be directed to the sheriff or to a constable of the county and must be subscribed by the justice and bear the date of the day of its issuance. It must intelligibly refer to the judgment by stating the names of the parties; the name of the justice before whom, the county where, and the time when it was rendered; the amount of the judgment if it be for money; and if less than the whole is due, the true amount due thereon. It must contain, in like cases, similar directions to the sheriff or constable as are required by the provisions of chapter 13 in an execution to the sheriff, except that it shall not direct the officer to in any manner levy upon or satisfy the judgment or any interest thereon from any real property.

History: En. Sec. 616, p. 165, Bannack Stat.; amd. Sec. 722, p. 181, Cod. Stat. 1871; re-en. Sec. 782, 1st Div. Rev. Stat. 1879; re-en. Sec. 802, 1st Div. Comp. Stat. 1887; amd. Sec. 1641, C. Civ. Proc. 1895; amd. Sec. 1641, p. 243, L. 1897; re-en. Sec. 7061, Rev. C. 1907; re-en. Sec. 9694, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 902; re-en. Sec. 9694, R.C.M. 1935; amd. Sec. 21, Ch. 491, L. 1973; R.C.M. 1947, 93-7402.

25-31-1103. Renewal and reissuance of execution. An execution may, at the request of the judgment creditor, be renewed before the expiration of the time fixed for its return, by the word "renewed" written thereon, th the date thereof, and subscribed by the justice. Such renewal has the fect of an original issue and may be repeated as often as necessary. If an ecution is returned unsatisfied, another may be afterward issued.

History: En. Sec. 1642, C. Civ. Proc. 1895; re-en. Sec. 7062, Rev. C. 1907; re-en. Sec. 9695, C.M. 1921; Cal. C. Civ. Proc. Sec. 903; re-en. Sec. 9695, R.C.M. 1935; R.C.M. 1947, 93-7403.

25-31-1104. Manner of execution. The sheriff or constable to whom e execution is directed must execute the same in the same manner as the eriff is required by the provisions of chapter 13 to proceed upon executions rected to him; and the constable, when the execution is directed to him, vested for that purpose with all the powers of the sheriff.

History: En. Sec. 617, p. 165, Bannack Stat.; re-en. Sec. 723, p. 181, Cod. Stat. 1871; re-en. Sec. 3, 1st Div. Rev. Stat. 1879; re-en. Sec. 803, 1st Div. Comp. Stat. 1887; amd. Sec. 1643, C. Civ. Proc. 95; re-en. Sec. 7063, Rev. C. 1907; re-en. Sec. 9696, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 904; re-en. :. 9696, R.C.M. 1935; R.C.M. 1947, 93-7404.

25-31-1105. Proceedings in aid of execution. Section 25-13-502 d part 1 of chapter 14, except 25-14-106, are applicable to justices' courts, e word "constable" being substituted, to that end, for the word "sheriff" d the word "justice" for the word "judge".

History: En. Sec. 1644, C. Civ. Proc. 1895; re-en. Sec. 7064, Rev. C. 1907; re-en. Sec. 9697, C.M. 1921; Cal. C. Civ. Proc. Sec. 905; re-en. Sec. 9697, R.C.M. 1935; R.C.M. 1947, 93-7405.

25-31-1106. Discharge of imprisoned judgment debtor. The ovisions of part 3 of chapter 14 in relation to the examination and discharge of a defendant imprisoned on execution in a civil action shall apply justices' courts, and justices of the peace shall have the same powers in eir courts as are by said sections granted to the judge.

History: En. Sec. 673, p. 172, Cod. Stat. 1871; re-en. Sec. 733, 1st Div. Rev. Stat. 1879; re-en. :. 753, 1st Div. Comp. Stat. 1887; re-en. Sec. 1546, C. Civ. Proc. 1895; re-en. Sec. 7025, Rev. C. 07; re-en. Sec. 9658, R.C.M. 1921; re-en. Sec. 9658, R.C.M. 1935; R.C.M. 1947, 93-6907.

25-31-1107 through 25-31-1110 reserved.

25-31-1111. Collection of judgment against county or county ficer. When a judgment is rendered against the county or against any unty officer in an action prosecuted against him in his name of office, ien the same is to be paid by the county, no execution must issue upon e judgment, but the same must be paid as other county charges. When so llected, the same must be paid by the county treasurer to the proper rson to whom the same is adjudged, upon the delivery of a proper voucher erefor.

History: En. Sec. 342, 5th Div. Rev. Stat. 1879; re-en. Sec. 751, 5th Div. Comp. Stat. 1887; amd. . 4199, Pol. C. 1895; re-en. Sec. 2879, Rev. C. 1907; re-en. Sec. 4450, R.C.M. 1921; re-en. Sec. 50, R.C.M. 1935; R.C.M. 1947, 16-811.

CHAPTER 32

PROCEDURE IN CITY COURTS

Part 1 — General Provisions

:tion
32-101. Applicability of laws on procedure in justices' courts.
32-102. Commencement of action — complaint.

25-32-103. Summons.
25-32-104. Answer and immediate trial.

Part 1

General Provisions

25-32-101. Applicability of laws on procedure in justices' courts. All proceedings in civil actions in city courts must, except as in this chapter otherwise provided, be conducted in the same manner as civil actions in justices' courts.

History: En. Sec. 1703, C. Civ. Proc. 1895; re-en. Sec. 7095, Rev. C. 1907; re-en. Sec. 9728, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 933; re-en. Sec. 9728, R.C.M. 1935; R.C.M. 1947, 93-7804.

25-32-102. Commencement of action — complaint. Civil actions in city courts are commenced by filing a complaint setting forth the violation of the ordinance complained of, with such particulars of time, place, and manner of violation as to enable the defendant to understand distinctly the character of the violation complained of and to answer the complaint. The ordinance may be referred to by its title and section and the number thereof.

History: En. Sec. 1700, C. Civ. Proc. 1895; re-en. Sec. 7092, Rev. C. 1907; re-en. Sec. 9725, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 929; re-en. Sec. 9725, R.C.M. 1935; R.C.M. 1947, 93-7801.

25-32-103. Summons. Immediately after filing the complaint, a summons must be issued, directed to the defendant and returnable either immediately or at any time designated therein, not exceeding 4 days from the date of its issuing.

History: En. Sec. 1701, C. Civ. Proc. 1895; re-en. Sec. 7093, Rev. C. 1907; re-en. Sec. 9726, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 930; re-en. Sec. 9726, R.C.M. 1935; R.C.M. 1947, 93-7802.

25-32-104. Answer and immediate trial. On the return of the summons, the defendant may answer the complaint. The answer may be oral or in writing, and immediately thereafter the case must be tried unless, for good cause shown, an adjournment is granted.

History: En. Sec. 1702, C. Civ. Proc. 1895; re-en. Sec. 7094, Rev. C. 1907; re-en. Sec. 9727, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 931; re-en. Sec. 9727, R.C.M. 1935; R.C.M. 1947, 93-7803.

CHAPTER 33

APPEAL TO DISTRICT COURT FROM JUSTICES' AND CITY COURTS

Part 1 — Filing the Appeal

Section

25-33-101. Exclusive method of review.
25-33-102. Time for appeal.
25-33-103. How appeal taken.
25-33-104. Papers to be transmitted.

Part 2 — Undertaking on Appeal—Stay of Execution

25-33-201. Undertaking on appeal.

33-202. Undertaking when prevailing party appeals.
33-203. Justification of sureties.
33-204. Stay of execution when undertaking filed.
33-205. Deposit of money in lieu of undertaking.
33-206. Waiver of undertaking or deposit.
33-207. Defective undertaking.

Part 3 — Proceedings in District Court

33-301. Trial de novo — pleadings, conduct of trial.
33-302. Procedure upon reversal on issue of law.
33-303. Appeal from judgment by default.
33-304. Dismissal of appeal upon delay — costs and damages.
33-305. Costs when appeal unsuccessful.
33-306. Effect of judgment of district court.

Part 1

Filing the Appeal

25-33-101. Exclusive method of review. A judgment or order in a il action, except when expressly made final by this code, may be reviewed prescribed in this chapter and not otherwise. A party aggrieved may peal in the cases prescribed in this chapter.

istory: Ap. p. Sec. 248, p. 94, Bannack Stat.; re-en. Sec. 317, p. 199, L. 1867; re-en. Sec. 366, 107, Cod. Stat. 1871; re-en. Sec. 405, p. 149, L. 1877; re-en. Sec. 405, 1st Div. Rev. Stat. 1879; n. Sec. 418, 1st Div. Comp. Stat. 1887; re-en. Sec. 1720, C. Civ. Proc. 1895; re-en. Sec. 7096, Rev. 1907; re-en. Sec. 9729, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 936; re-en. Sec. 9729, R.C.M. 1935; l. Sup. Ct. Ord. 11020, eff. January 1, 1966; Sec. 93-8001, R.C.M. 1947; Ap. p. Sec. 248, p. 94, mack Stat.; amd. Sec. 319, p. 199, L. 1867; re-en. Sec. 368, p. 107, Cod. Stat. 1871; re-en. Sec. , p. 150, L. 1877; re-en. Sec. 407, 1st Div. Rev. Stat. 1879; re-en. Sec. 420, 1st Div. Comp. Stat. 7; re-en. Sec. 1721, C. Civ. Proc. 1895; re-en. Sec. 7097, Rev. C. 1907; re-en. Sec. 9730, R.C.M. 1; Cal. C. Civ. Proc. Sec. 938; re-en. Sec. 9730, R.C.M. 1935; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966; Sec. 93-8002, R.C.M. 1947; R.C.M. 1947, 93-8001(part), 93-8002(part).

25-33-102. Time for appeal. Any party dissatisfied with the judgment ndered in a civil action in a city or justice's court may appeal therefrom the district court of the county at any time within 30 days after the rendin of the judgment.

istory: En. Sec. 637, p. 169, Bannack Stat.; re-en. Sec. 742, p. 185, Cod. Stat. 1871; re-en. Sec. , 1st Div. Rev. Stat. 1879; re-en. Sec. 822, 1st Div. Comp. Stat. 1887; amd. Sec. 1760, C. Civ. Proc. 5; re-en. Sec. 7121, Rev. C. 1907; amd. Sec. 1, Ch. 4, L. 1911; re-en. Sec. 9754, R.C.M. 1921; . C. Civ. Proc. Sec. 974; re-en. Sec. 9754, R.C.M. 1935; R.C.M. 1947, 93-7901(part).

25-33-103. How appeal taken. The appeal is taken by serving a copy the notice of appeal on the adverse party or his attorney and by filing the ginal notice of appeal with the justice or judge. The order of serving and ng is immaterial.

istory: En. Sec. 637, p. 169, Bannack Stat.; re-en. Sec. 742, p. 185, Cod. Stat. 1871; re-en. Sec. , 1st Div. Rev. Stat. 1879; re-en. Sec. 822, 1st Div. Comp. Stat. 1887; amd. Sec. 1760, C. Civ. Proc. 5; re-en. Sec. 7121, Rev. C. 1907; amd. Sec. 1, Ch. 4, L. 1911; re-en. Sec. 9754, R.C.M. 1921; . C. Civ. Proc. Sec. 974; re-en. Sec. 9754, R.C.M. 1935; R.C.M. 1947, 93-7901(part).

25-33-104. Papers to be transmitted. Upon receiving the notice of peal and filing an undertaking as required in 25-33-201, 25-33-203, and

25-33-205, the justice or judge must, within 10 days, upon the payment of the fees therefor, transmit to the clerk of the district court a certified copy of his docket, the pleadings, all notices, motions, and other papers filed in the cause, the notice of appeal, and the undertaking filed; and the justice or judge may be compelled by the district court, by an order entered upon motion, to transmit such papers and may be fined for neglect or refusal to transmit the same. A certified copy of such order may be served on the justice or judge by the party or his attorney.

History: En. Sec. 639, p. 170, Bannack Stat.; re-en. Sec. 744, p. 186, Cod. Stat. 1871; re-en. Sec 804, 1st Div. Rev. Stat. 1879; re-en. Sec. 824, 1st Div. Comp. Stat. 1887; en. Sec. 1762, C. Civ. Proc 1895; re-en. Sec. 7123, Rev. C. 1907; re-en. Sec. 9756, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 977; re-en Sec. 9756, R.C.M. 1935; R.C.M. 1947, 93-7903.

Part 2

Undertaking on Appeal — Stay of Execution

25-33-201. Undertaking on appeal. (1) An appeal from a justice's or city court is not effectual for any purpose unless an undertaking be filed, with two or more sureties, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money. The undertaking must be conditioned, when the action is for the recovery of money, that the appellant will pay the amount of the judgment appealed from and all costs if the appeal be withdrawn or dismissed or the amount of any judgment and all costs that may be recovered against him in the action in the district court.

(2) An appeal from a justice's or city court is not effectual for any purpose unless an undertaking be filed, with two or more sureties, in a sum equal to twice the value of the property, including costs, when the judgment is for the recovery of specific personal property. When the action is for the recovery of specific personal property, the undertaking must be conditioned that the appellant will pay the judgment and costs appealed from and obey the order of the court made therein if the appeal be withdrawn or dismissed or pay any judgment and costs that may be recovered against him in said action in the district court and obey any order made by the court therein.

(3) When the judgment appealed from directs the delivery of possession of real property, the execution of the same cannot be stayed unless a written undertaking be executed on the part of the appellant, with two or more sureties, to the effect that:

(a) during the possession of such property by the appellant, he will not commit or suffer to be committed any waste thereon; and

(b) if the appeal be dismissed or withdrawn or the judgment affirmed or judgment be recovered against him in the action in the district court, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof or he will pay any judgment and costs that may be recovered against him in said action in the district court, not exceeding a sum to be fixed by the justice of the court from which the appeal is to be taken, which sum must be specified in the undertaking.

History: En. Sec. 638, p. 169, Bannack Stat.; re-en. Sec. 743, p. 185, Cod. Stat. 1871; re-en. Sec 803, 1st Div. Rev. Stat. 1879; re-en. Sec. 823, 1st Div. Comp. Stat. 1887; amd. Sec. 1763, C. Civ. Proc

5; en. Sec. 1, Ch. 186, L. 1907; Sec. 7124, Rev. C. 1907; re-en. Sec. 9757, R.C.M. 1921; Cal. C. . Proc. Sec. 978; re-en. Sec. 9757, R.C.M. 1935; R.C.M. 1947, 93-7904(part).

25-33-202. Undertaking when prevailing party appeals. If the rty in whose favor the judgment is rendered appeals, the undertaking must in the sum of $100 and conditioned that he will pay all costs that may awarded against him and obey any order of court made in the action.

listory: En. Sec. 640, p. 170, Bannack Stat.; re-en. Sec. 745, p. 186, Cod. Stat. 1871; re-en. Sec. , 1st Div. Rev. Stat. 1879; re-en. Sec. 825, 1st Div. Comp. Stat. 1887; en. Sec. 1764, C. Civ. Proc. 5; re-en. Sec. 7125, Rev. C. 1907; re-en. Sec. 9758, R.C.M. 1921; re-en. Sec. 9758, R.C.M. 1935; .M. 1947, 93-7905(part).

25-33-203. Justification of sureties. The adverse party may except the sufficiency of the sureties within 5 days after the filing of the underking, and unless they or other sureties justify before the justice or a judge the district court of the county in which such action has been tried within days thereafter, upon notice to the adverse party, to the amounts stated their affidavits, the appeal must be regarded as if no such undertaking d been given. The sureties on the undertakings mentioned in this part ıst justify as provided in 33-26-102.

listory: Ap. p. Sec. 638, p. 169, Bannack Stat.; re-en. Sec. 743, p. 185, Cod. Stat. 1871; re-en. . 803, 1st Div. Rev. Stat. 1879; re-en. Sec. 823, 1st Div. Comp. Stat. 1887; amd. Sec. 1763, C. Civ. c. 1895; en. Sec. 1, Ch. 186, L. 1907; Sec. 7124, Rev. C. 1907; re-en. Sec. 9757, R.C.M. 1921; . C. Civ. Proc. Sec. 978; re-en. Sec. 9757, R.C.M. 1935; Sec. 93-7904, R.C.M. 1947; Ap. p. Sec. , p. 170, Bannack Stat.; re-en. Sec. 745, p. 186, Cod. Stat. 1871; re-en. Sec. 805, 1st Div. Rev. t. 1879; re-en. Sec. 825, 1st Div. Comp. Stat. 1887; en. Sec. 1764, C. Civ. Proc. 1895; re-en. Sec. 5, Rev. C. 1907; re-en. Sec. 9758, R.C.M. 1921; re-en. Sec. 9758, R.C.M. 1935; Sec. 93-7905, .M. 1947; R.C.M. 1947, 93-7904(part), 93-7905(part).

25-33-204. Stay of execution when undertaking filed. If an ecution be issued, on the filing of the undertaking, the justice or judge ıst direct the officer to stay all proceedings on the same. Such officer must, on the payment of his fees for services rendered on the execution, thereon relinquish all property levied upon and deliver the same to the judgent debtor, together with all moneys collected from sales or otherwise. If fees on the execution be not paid, the officer may retain so much of the operty or proceeds thereof as may be necessary to pay the same.

listory: En. Sec. 642, p. 170, Bannack Stat.; re-en. Sec. 747, p. 186, Cod. Stat. 1871; re-en. Sec. , 1st Div. Rev. Stat. 1879; re-en. Sec. 827, 1st Div. Comp. Stat. 1887; amd. Sec. 1765, C. Civ. Proc. 5; re-en. Sec. 7126, Rev. C. 1907; re-en. Sec. 9759, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 979; re-en. . 9759, R.C.M. 1935; R.C.M. 1947, 93-7906.

25-33-205. Deposit of money in lieu of undertaking. (1) A deposit the amount of the judgment, including all costs, appealed from or of the lue of the property, including all costs, in actions for the recovery of speic personal property, with the justice or judge is equivalent to the filing the undertaking, and in such cases, the justice or judge must transmit the oney to the clerk of the district court to be by him paid out on the order the court.

(2) In all cases where an undertaking is required on appeal by the provins of this chapter, a deposit in the court below of the amount of the judgent appealed from and $300 in addition shall be equivalent to filing the dertaking.

listory: (1)En. Sec. 638, p. 169, Bannack Stat.; re-en. Sec. 743, p. 185, Cod. Stat. 1871; re-en. . 803, 1st Div. Rev. Stat. 1879; re-en. Sec. 823, 1st Div. Comp. Stat. 1887; amd. Sec. 1763, C. Civ.

Proc. 1895; en. Sec. 1, Ch. 186, L. 1907; Sec. 7124, Rev. C. 1907; re-en. Sec. 9757, R.C.M. 1921 Cal. C. Civ. Proc. Sec. 978; re-en. Sec. 9757, R.C.M. 1935; Sec. 93-7904, R.C.M. 1947; (2)En. Sec 388, p. 112, Cod. Stat. 1871; re-en. Sec. 417, p. 153, L. 1877; re-en. Sec. 417, 1st Div. Rev. Stat. 1879 re-en. Sec. 430, 1st Div. Comp. Stat. 1887; amd. Sec. 1732, C. Civ. Proc. 1895; re-en. Sec. 7108, Rev C. 1907; re-en. Sec. 9741, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 948; re-en. Sec. 9741, R.C.M. 1935 amd. Sup. Ct. Ord. 11020, eff. January 1, 1966; Sec. 93-8013, R.C.M. 1947; R.C.M. 1947 93-7904(part), 93-8013(part).

25-33-206. Waiver of undertaking or deposit. In all cases wher an undertaking is required on appeal by the provisions of this chapter, th undertaking or deposit may be waived by the written consent of the respondent.

History: En. Sec. 388, p. 112, Cod. Stat. 1871; re-en. Sec. 417, p. 153, L. 1877; re-en. Sec. 417 1st Div. Rev. Stat. 1879; re-en. Sec. 430, 1st Div. Comp. Stat. 1887; amd. Sec. 1732, C. Civ. Proc 1895; re-en. Sec. 7108, Rev. C. 1907; re-en. Sec. 9741, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 948; re-en Sec. 9741, R.C.M. 1935; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966; R.C.M. 1947, 93-8013(part).

25-33-207. Defective undertaking. No appeal shall be dismissed fo insufficiency of the undertaking thereon or for any defect or irregularit therein if a good and sufficient undertaking be filed in the district court a or before the hearing of the motion to dismiss the appeal, which undertakin must be approved by the district judge.

History: En. Sec. 1767, C. Civ. Proc. 1895; re-en. Sec. 7128, Rev. C. 1907; re-en. Sec. 9761 R.C.M. 1921; re-en. Sec. 9761, R.C.M. 1935; R.C.M. 1947, 93-7908.

Part 3

Proceedings in District Court

25-33-301. Trial de novo — pleadings, conduct of trial. (1) Al appeals from justices' or city courts must be tried anew in the district cour on the papers filed in the justice's or city court unless the court, for goo cause shown and on such terms as may be just, allow other or amende pleadings to be filed in such action. The court may order new or amende pleadings to be filed. Each party has the benefit of all legal objections mad in the justice's or city court.

(2) When the action is tried anew on appeal, the trial must be conducte in all respects as other trials in the district court. The provisions of this cod as to trials in the district courts are applicable to trials on appeal in the district court.

History: (1)En. Sec. 641, p. 170, Bannack Stat.; re-en. Sec. 746, p. 186, Cod. Stat. 1871; re-e Sec. 806, 1st Div. Rev. Stat. 1879; re-en. Sec. 826, 1st Div. Comp. Stat. 1887; amd. Sec. 1761, C. Ci Proc. 1895; re-en. Sec. 7122, Rev. C. 1907; re-en. Sec. 9755, R.C.M. 1921; re-en. Sec. 9755, R.C.M 1935; Sec. 93-7902, R.C.M. 1947; (2)En. Sec. 1766, C. Civ. Proc. 1895; re-en. Sec. 7127, Rev. C. 190 re-en. Sec. 9760, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 980; re-en. Sec. 9760, R.C.M. 1935; Se 93-7907, R.C.M. 1947; R.C.M. 1947, 93-7902(part), 93-7907(part).

25-33-302. Procedure upon reversal on issue of law. When judgment is reversed or set aside on a question of law arising in the justice' or city court, the district court must either try the case anew or render judgment.

History: En. Sec. 641, p. 170, Bannack Stat.; re-en. Sec. 746, p. 186, Cod. Stat. 1871; re-en. Se 806, 1st Div. Rev. Stat. 1879; re-en. Sec. 826, 1st Div. Comp. Stat. 1887; amd. Sec. 1761, C. Civ. Pro 1895; re-en. Sec. 7122, Rev. C. 1907; re-en. Sec. 9755, R.C.M. 1921; re-en. Sec. 9755, R.C.M. 193 R.C.M. 1947, 93-7902(part).

25-33-303. Appeal from judgment by default. There is no appeal m a judgment by default rendered in a justice's or city court except on estions of law which appear on the face of the papers or proceedings and cept in cases when the justice's or city court has abused its discretion in ting aside or refusing to set aside a default or judgment. If the judgment default is set aside, the district court must allow pleadings to be filed and the case.

istory: En. Sec. 641, p. 170, Bannack Stat.; re-en. Sec. 746, p. 186, Cod. Stat. 1871; re-en. Sec. , 1st Div. Rev. Stat. 1879; re-en. Sec. 826, 1st Div. Comp. Stat. 1887; amd. Sec. 1761, C. Civ. Proc. 5; re-en. Sec. 7122, Rev. C. 1907; re-en. Sec. 9755, R.C.M. 1921; re-en. Sec. 9755, R.C.M. 1935; .M. 1947, 93-7902(part).

25-33-304. Dismissal of appeal upon delay — costs and dam-es. For a failure to prosecute an appeal or unnecessary delay in bringing to a hearing, the district court may order the appeal to be dismissed, with sts; and if it appear to such court that the appeal was made solely for lay, it may add to the costs such damages as may be just, not exceeding % of the judgment appealed from.

istory: En. Sec. 1766, C. Civ. Proc. 1895; re-en. Sec. 7127, Rev. C. 1907; re-en. Sec. 9760, .M. 1921; Cal. C. Civ. Proc. Sec. 980; re-en. Sec. 9760, R.C.M. 1935; R.C.M. 1947, 93-7907(part).

25-33-305. Costs when appeal unsuccessful. If the party appealing ls to reduce the judgment against him or to enlarge the judgment in his vor appealed from $10 or more or reverse the same in the district court, shall not recover any costs of appeal.

istory: En. Sec. 640, p. 170, Bannack Stat.; re-en. Sec. 745, p. 186, Cod. Stat. 1871; re-en. Sec. , 1st Div. Rev. Stat. 1879; re-en. Sec. 825, 1st Div. Comp. Stat. 1887; en. Sec. 1764, C. Civ. Proc. 5; re-en. Sec. 7125, Rev. C. 1907; re-en. Sec. 9758, R.C.M. 1921; re-en. Sec. 9758, R.C.M. 1935; .M. 1947, 93-7905(part).

25-33-306. Effect of judgment of district court. Judgments ndered in the district court on appeal shall have the same force and effect d may be enforced in the same manner as judgments in actions com-enced in the district court.

istory: En. Sec. 1766, C. Civ. Proc. 1895; re-en. Sec. 7127, Rev. C. 1907; re-en. Sec. 9760, .M. 1921; Cal. C. Civ. Proc. Sec. 980; re-en. Sec. 9760, R.C.M. 1935; R.C.M. 1947, 93-7907(part).

CHAPTER 34

SMALL CLAIMS PROCEDURE — DISTRICT COURT

Part 1 — General Provisions—Jurisdiction

ction

-34-101. Purpose — liberal construction.
-34-102. Jurisdiction — joinder.
-34-103. Removal from district court.
-34-104. Venue.
-34-105. Parties — representation.

Part 2 — Procedure Before Trial

-34-201. Commencement of actions.
-34-202. Attachment not available.
-34-203. Order of court directing defendant to pay or answer claim.

25-34-204. Hearing date.
25-34-205. Service on defendant.
25-34-206. Return of service.
25-34-207. Defendant's counterclaim.
25-34-208. Clerk's fees.

Part 3 — The Trial

25-34-301. Jury — waiver — request.
25-34-302. Proceedings informal — court reporters.
25-34-303. Evidence — subpoena power.

Part 4 — Judgment—Appeal

25-34-401. Entry of judgment.
25-34-402. Costs.
25-34-403. Appeals.
25-34-404. Execution of judgment.

Part 1

General Provisions — Jurisdiction

25-34-101. Purpose — liberal construction. It is the purpose o this chapter to provide a speedy remedy in claims falling hereunder and t promote a forum in which such claims may be heard and disposed of withou the necessity of formal trial. For this reason, the provisions hereof should b liberally construed to provide an informal but equitable means of justice, an the small claims court judges are required to assist all parties before them to obtain substantial justice.

History: En. 93-328 by Sec. 7, Ch. 519, L. 1975; R.C.M. 1947, 93-328.

25-34-102. Jurisdiction — joinder. (1) The small claims court ha original jurisdiction in all actions for the recovery of money or specific personal property when such action arises out of a contract, express or implied the amount of the claim, exclusive of costs, does not exceed $1,500, and th defendant can be served within the county or counties for which the smal claims court has been created.

(2) More than one claim may be joined if all claims joined would separately meet the requirements for jurisdiction in the small claims court an the total value of money claimed or property sought does not exceed $1,500.

History: En. 93-329 by Sec. 8, Ch. 519, L. 1975; R.C.M. 1947, 93-329(1).

25-34-103. Removal from district court. A district court judge ma require any action filed in district court to be removed to the small claim court if the amount in controversy does not exceed $1,500. The small claim court shall hear any action so removed from the district court.

History: En. 93-329 by Sec. 8, Ch. 519, L. 1975; R.C.M. 1947, 93-329(2).

25-34-104. Venue. Proper venue for actions commenced in smal claims court is the same as that provided by law for civil actions commence in district court.

History: En. 93-331 by Sec. 10, Ch. 519, L. 1975; R.C.M. 1947, 93-331.

25-34-105. Parties — representation. (1) Parties in the small claims urt may be individuals, partnerships, corporations, unions, associations, or y other kind of organization or entity, except the state or any agency reof.

2) A party may not be represented by an attorney unless all parties are resented by an attorney in a small claims court, except as set forth in subtion (3) herein.

3) An individual shall represent himself in the small claims court. A tnership shall be represented by a partner or one of its employees. A on shall be represented by a union member or union employee. A corporan shall be represented by one of its employees. An association shall be resented by one of its members or by an employee of the association. Any er kind of organization or entity shall be represented by one of its mems or employees.

4) Only a party, natural or otherwise, who has been a party to the transion with the defendant for which the claim is brought may file and prosee a claim in the small claims court.

5) No party may file an assigned claim in the small claims court.

6) Notwithstanding any other provision of this section, an executor or ninistrator of a decedent's estate, a guardian, or a conservator may be a ty in the small claims court.

istory: En. 93-330 by Sec. 9, Ch. 519, L. 1975; R.C.M. 1947, 93-330; amd. Sec. 8, Ch. 409, L.

Part 2

Procedure Before Trial

25-34-201. Commencement of actions. (1) Actions in small claims rt shall be commenced by filing an affidavit with the clerk of court. The all claims court judge shall assist any claimant in preparing an affidavit may direct the clerk of court to provide such assistance.

2) The clerk of court shall provide forms for the affidavits, which shall in substantially the following form:

In the Small Claims Court of the .... Judicial District in and for the inty of ...., State of Montana.

............., intiff vs. ...., fendant	Doc. ...... No. ...... PLAINTIFF'S COMPLAINT/ AFFIDAVIT NOTICE TO DEFENDANT, SEEKING MONEY DAMAGES

laintiff states that defendant(s) owe and should be ordered to pay to me sum of ...., because on .... (date) at .... (place), the defendant(s)

....

....

laintiff declares that the defendant or defendants are not a "person in itary service" or "person in the military service of the United States" as ined in Sec. 101 of the Soldiers' and Sailors' Civil Relief Act of 1940.

To the best of my knowledge and belief, the defendant named above resides at the following address or the following is the business address:

....

....

My printed name and printed address are as follows: ....
Signed in my presence Signature: ....
....
Clerk or Deputy Today's date:...

ORDER OF THE COURT/NOTICE TO DEFENDANT

This claim has been filed against you. You must appear before this court on .... (date) at .... (time) at .... (location).
If you do not appear, a judgment may be entered against you. Costs of the action also may be charged against you. You should read the information on the back of this claim and notice. If you have any questions about the procedure, you may contact the Clerk of the Court in person at .... (location of court) or by telephone at .... (number)

....
Clerk of the Court
By: ....

History: En. 93-326, 93-332 by Secs. 5, 11, Ch. 519, L. 1975; R.C.M. 1947, 93-326(part), 93-332.

25-34-202. Attachment not available. Attachment or prejudgment garnishment is not available in actions brought in small claims court.

History: En. 93-338 by Sec. 17, Ch. 519, L. 1975; R.C.M. 1947, 93-338(part).

25-34-203. Order of court directing defendant to pay or answer claim. (1) Upon filing the affidavit and payment of the fee hereinafter provided, the clerk of court shall cause to be delivered to the sherif of the county of the defendant's residence a copy of the affidavit together with the original and a copy of an order issued by the court, directed to the defendant, and directing the defendant to pay the claim set forth in the affidavit or deliver up the property described or, in the alternative, to appear and answer the claim set forth in the affidavit.

(2) The order shall:

(a) specify the time, date, and place set for hearing the claim;

(b) state that, if the defendant fails to appear at the hearing and has no satisfied the claim, judgment will be entered against him in the amount o for the relief claimed, for costs; and

(c) be signed by the clerk of court and bear the seal of the court.

History: En. 93-333 by Sec. 12, Ch. 519, L. 1975; R.C.M. 1947, 93-333.

25-34-204. Hearing date. The date for the appearance of the defendant to be set forth in the order shall be determined by the clerk of court in accordance with rules adopted by the small claims judge and shall not be more than 30 or less than 10 days from the date of the order. Service of the order and copy of the affidavit shall be made upon the defendant not less than 7 days prior to the date set for his appearance by the order. If the order is not timely served, plaintiff may have a new appearance date set by the clerk and a new order issued and delivered to the sheriff, and, if necessary, peated orders may be issued at any time within 1 year after the commence-ent of the action.

History: En. 93-335 by Sec. 14, Ch. 519, L. 1975; R.C.M. 1947, 93-335.

25-34-205. Service on defendant. The original order shall be shown the defendant and a copy of it along with a copy of the affidavit shall be rved upon the defendant by the sheriff in the same manner provided by w for service of process in civil actions in district court. The provisions of w relating to sheriff's fees are applicable to this section.

History: En. 93-334 by Sec. 13, Ch. 519, L. 1975; R.C.M. 1947, 93-334.

25-34-206. Return of service. The sheriff, after effecting service, all make return upon the original order and file it with the clerk of court.

History: En. 93-336 by Sec. 15, Ch. 519, L. 1975; R.C.M. 1947, 93-336.

25-34-207. Defendant's counterclaim. (1) If the defendant wishes to sert a counterclaim against the plaintiff, he shall file a written answer tting forth his counterclaim against the plaintiff and shall cause the answer be served upon the plaintiff not less than 72 hours before the date set for e hearing. Service shall be made in the same manner in which service is ade upon the defendant.

(2) A counterclaim or setoff may not exceed $1,500. If a counterclaim or toff is asserted in excess of $1,500, the jurisdiction of the small claims court er the plaintiff's claim is not defeated, but the court shall limit its determi- ation of the counterclaim or setoff to the question of whether plaintiff's aim is discharged thereby, leaving defendant to prosecute the balance of his aim in appropriate district court action.

History: En. 93-337 by Sec. 16, Ch. 519, L. 1975; R.C.M. 1947, 93-337.

25-34-208. Clerk's fees. (1) The clerk of court shall collect a fee of $5:

(a) from the plaintiff upon the filing of the affidavit;

(b) from the defendant upon the filing of a written answer.

(2) The laws relating to paupers' affidavits apply to actions before the nall claims courts.

History: En. 93-344 by Sec. 23, Ch. 519, L. 1975; R.C.M. 1947, 93-344(1), (2).

Part 3

The Trial

25-34-301. Jury — waiver — request. The plaintiff, by filing the fidavit for a proceeding in small claims court, waives the right to jury trial. efendant may request a jury, provided such request is made not less than hours prior to the date set for hearing. If defendant pleads a counterclaim setoff, he too waives a jury trial. If a jury is requested, it shall be impan-ed in the same fashion as provided for district court juries in civil cases volving less than $10,000.

History: En. 93-340 by Sec. 19, Ch. 519, L. 1975; R.C.M. 1947, 93-340.

25-34-302. Proceedings informal — court reporters. (1) If the tion is tried to the court, the proceedings shall be informal to the extent possible in order to dispense speedy justice to the parties. A reporter is not necessary unless the judge finds the issues sufficiently complex that a record is desirable, in which case he shall make arrangements with a court reporter of the district court to take the testimony. The judge shall make findings of fact sufficient to establish in full the basis of his judgment and shall file them with his judgment.

(2) If a jury is impaneled, it shall try all issues of fact, and in such case there shall be a court reporter.

History: **En. 93-339 by Sec. 18, Ch. 519, L. 1975; R.C.M. 1947, 93-339.**

25-34-303. Evidence — subpoena power. Both parties have the right to offer evidence, written and oral, and the judge may direct the production of evidence as he deems appropriate. The small claims court has the subpoena power granted to district courts in civil cases.

History: **En. 93-341 by Sec. 20, Ch. 519, L. 1975; R.C.M. 1947, 93-341.**

Part 4

Judgment — Appeal

25-34-401. Entry of judgment. Upon the conclusion of a case tried to the court, the judge shall make his findings and enter judgment. Judgment shall be entered upon a jury verdict in the same manner as is provided for district court jury trials.

History: **En. 93-342 by Sec. 21, Ch. 519, L. 1975; R.C.M. 1947, 93-342.**

25-34-402. Costs. The prevailing party in an action before the small claims court is entitled to costs.

History: **En. 93-344 by Sec. 23, Ch. 519, L. 1975; R.C.M. 1947, 93-344(3).**

25-34-403. Appeals. (1) If either party is dissatisfied with the judgment of the small claims court, he may appeal to the district court of the county where the judgment was rendered in the same fashion as appeals in other civil actions. Any such appeal shall be tried de novo.

(2) In the event that the parties are represented by counsel on appeal, the judge may grant the prevailing party, in addition to costs, reasonable attorney fees.

History: **En. 93-343 by Sec. 22, Ch. 519, L. 1975; R.C.M. 1947, 93-343.**

25-34-404. Execution of judgment. Proceedings to enforce or collect a judgment are governed by the laws relating to executions upon district court judgments.

History: **En. 93-338 by Sec. 17, Ch. 519, L. 1975; R.C.M. 1947, 93-338(part).**

CHAPTER 35

SMALL CLAIMS PROCEDURE — JUSTICE'S COURT

Part 1 — General Provisions—Jurisdiction

Section
25-35-101. Purpose.
25-35-102. Jurisdiction.

-35-103. Removal from district court.
-35-104. Venue.
-35-105. Parties — representation.

Part 2 — Procedure Before Trial

-35-201. Commencement of action — assistance to claimant.
-35-202. Form of complaint and order of court/notice to defendant.
-35-203. Hearing date.
-35-204. Service on defendant.
-35-205. Return of service.
-35-206. Renumbered 25-35-212 by Code Commissioner, 1979.
-35-207. Renumbered 25-35-213 by Code Commissioner, 1979.
Sections 25-35-208 through 25-35-210 reserved.
-35-211. Defendant's counterclaim.
-35-212. No further pleadings.
-35-213. Fees.

Part 3 — The Trial

-35-301. Proceedings to be informal.
-35-302. Witnesses — evidence — subpoena power.
-35-303. Record of proceedings.

Part 4 — Judgment—Appeal

-35-401. Entry of judgment.
-35-402. Costs.
-35-403. Appeal to district court — commencement and scope of.
-35-404. Record on appeal.
-35-405. Use of transcripts or tapes by district court.
-35-406. Execution of judgment.

Part 1

General Provisions — Jurisdiction

25-35-101. Purpose. It is the purpose of this chapter to provide a peedy remedy for small claims and to promote a forum in which such claims ay be heard and disposed of without the necessity of a formal trial.

History: En. 93-345 by Sec. 1, Ch. 572, L. 1977; R.C.M. 1947, 93-345.

25-35-102. Jurisdiction. The small claims court has jurisdiction over ll actions for the recovery of money or specific personal property when the mount claimed does not exceed $750, exclusive of costs, and the defendant an be served within the county where the action is commenced.

History: En. 93-347 by Sec. 3, Ch. 572, L. 1977; R.C.M. 1947, 93-347(1).

25-35-103. Removal from district court. A district court judge may equire any action filed in district court to be removed to the small claims ourt if the amount in controversy does not exceed $500. The small claims ourt shall hear any action so removed from the district court.

History: En. 93-347 by Sec. 3, Ch. 572, L. 1977; R.C.M. 1947, 93-347(2).

25-35-104. Venue. Proper venue for actions commenced in the small claims court is the same as that provided by law for civil actions commenced in justice's court.

History: En. 93-348 by Sec. 4, Ch. 572, L. 1977; R.C.M. 1947, 93-348.

25-35-105. Parties — representation. (1) Parties in the small claims court may be individuals, partnerships, corporations, unions, associations, or any other kind of organization or entity, except the state or any agency thereof.

(2) A party may not be represented by an attorney unless all parties are represented by an attorney in a small claims court.

(3) An individual may represent himself in a small claims court. A partnership may be represented by a partner or one of its employees. A union may be represented by a union member or union employee. A corporation may be represented by one of its employees. An association may be represented by one of its members or by an employee of the association. Any other kind of organization or entity may be represented by one of its members or employees.

(4) Only a party, natural or otherwise, who has been a party to the transaction with the defendant for which the claim is brought may file and prosecute a claim in the small claims court.

(5) No party may file an assigned claim in the small claims court.

(6) No party may file more than three claims in any calendar year.

(7) Notwithstanding any other provision of this section, a personal representative of a decedent's estate, a guardian, or a conservator may be a party in the small claims court.

History: En. 93-354 by Sec. 10, Ch. 572, L. 1977; R.C.M. 1947, 93-354; amd. Sec. 9, Ch. 409, L. 1979.

Part 2

Procedure Before Trial

25-35-201. Commencement of action — assistance to claimant. (1) A small claims action is commenced whenever any person appears before a justice of the peace and executes a sworn small claims complaint in substantially the same form as set forth in 25-35-202.

(2) The justice shall assist any claimant in preparing his complaint or instruct his clerk to provide such assistance. The attorney general shall prepare a pamphlet explaining in plain language the procedures for prosecuting and defending a claim in small claims court and distribute a sufficient number of copies of the pamphlet to each small claims court. The justice or his clerk shall give the plaintiff a copy when the plaintiff appears to execute his complaint, and a copy must be attached to the order of the court/notice to defendant.

History: En. 93-349, 93-361 by Secs. 5, 17, Ch. 572, L. 1977; R.C.M. 1947, 93-349(part), 93-361(1); amd. Sec. 1, Ch. 501, L. 1979.

25-35-202. Form of complaint and order of court/notice to defendant. The sworn complaint and order of the court shall be made on a blank substantially in the following form:

IN THE SMALL CLAIMS DIVISION OF THE JUSTICE'S
COURT OF .... COUNTY, MONTANA
BEFORE ...., JUSTICE OF THE PEACE

....

....
Plaintiff,

....
....
Defendant(s)

Complaint
Case No. .....

....

Comes now the plaintiff, being first duly sworn, upon oath, and complains nd alleges that defendant is indebted to plaintiff in the sum of $......, for ....
....
....
hich sum is now due, owing, and unpaid despite demands for the payment hereof, together with plaintiff's costs herein expended.

Dated this ...... day of ...., 19....

....
Plaintiff

....
Plaintiff's address

Subscribed and sworn to before me this ...... day of ...., 19....

....
Justice of the peace
By: ....
Clerk, small claims division

ORDER OF COURT/
NOTICE TO DEFENDANT

THE STATE OF MONTANA TO THE ABOVE-NAMED DEFENDANT(S):

You are hereby directed to appear and answer the within and foregoing complaint at:

....
....
on................ at ....
Reset for .... at ....
Reset for .... at ....
Reset for .... at ....

nd to have with you, then and there, all books, papers, and witnesses needed by you to establish your defense to the claim; and you are further notified that in case you do not appear, judgment will be taken against you by default for the relief demanded in the complaint and for costs of this action, including costs of service of the complaint and order of the court/notice to defendant.

To the Sheriff, Constable, or Server of process of said county, greetings:

Make legal service and due return thereof on the defendant at ....

Dated this .... day of ...., 19....

....
Justice of the peace
By: ....
Clerk of small claims division

History: En. 93-350 by Sec. 6, Ch. 572, L. 1977; R.C.M. 1947, 93-350.

25-35-203. Hearing date. The date for the appearance of the defendant to be set forth in the order shall be determined by the justice of the peace or by his clerk in accordance with rules adopted by the justice of the peace and may not be more than 40 or less than 10 days from the date of the order. Service of the order and a copy of the sworn complaint shall be made upon the defendant not less than 5 days prior to the date set for his appearance by the order. If the order is not timely served, the plaintiff may have a new appearance date set by the justice of the peace or his clerk and a new order issued and delivered to the sheriff, constable, or other process server. If necessary, repeated orders may be issued at any time within 1 year after the commencement of the action.

History: En. 93-352 by Sec. 8, Ch. 572, L. 1977; R.C.M. 1947, 93-352; amd. Sec. 2, Ch. 501, L. 1979.

25-35-204. Service on defendant. The original of the order and notice shall be shown to the defendant, and a copy of it along with a copy of the sworn complaint shall be served upon the defendant by the sheriff, constable, or other process server in the same manner provided by law for service of process in civil actions in justice's court. The provisions of law relating to sheriff's fees are applicable to this section.

History: En. 93-351 by Sec. 7, Ch. 572, L. 1977; R.C.M. 1947, 93-351.

25-35-205. Return of service. The sheriff, constable, or other process server shall, after affecting service, return the original order to the justice of the peace or his clerk.

History: En. 93-353 by Sec. 9, Ch. 572, L. 1977; R.C.M. 1947, 93-353.

25-35-206. Renumbered 25-35-212 by Code Commissioner, 1979.

25-35-207. Renumbered 25-35-213 by Code Commissioner, 1979.

25-35-208 through 25-35-210 reserved.

25-35-211. Defendant's counterclaim. (1) The defendant may assert a counterclaim against the plaintiff arising out of the same transaction or occurrence that is the subject matter of the plaintiff's claim by appearing before the justice of the peace and executing a sworn small claims counterclaim in substantially the same form as set forth in subsection (3). The defendant shall cause the counterclaim to be served on the plaintiff not less than 72 hours before the date set for the hearing. Service shall be made in the same manner in which service of the order of court/notice to defendant is made on the defendant. A defendant may not assert as a counterclaim any claim not arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim.

(2) A counterclaim or setoff may not exceed $750. If a counterclaim or toff is asserted in excess of $750, the jurisdiction of the small claims court er the plaintiff's claim is not defeated, but the court shall limit its determi-tion of the counterclaim or setoff to the question of whether the plaintiff's aim is discharged thereby, leaving the defendant to prosecute the balance his claim in an appropriate district court action.

(3) The counterclaim shall be made on a blank substantially in the fol-wing form:

IN THE SMALL CLAIMS DIVISION OF THE JUSTICE'S COURT OF
.... COUNTY, MONTANA
BEFORE ...., JUSTICE OF THE PEACE

....

....
Plaintiff
.
....
....
Defendant(s)

Counterclaim
Case No. ...

....

Comes now the defendant, being first duly sworn, upon oath, and alleges at defendant is entitled to counterclaim against the plaintiff in the aintiff's pending action in the sum of $....., for ....
....
....
nich sum is now due, together with defendant's costs herein expended.

Dated this ... day of ...., 19...

....
Defendant

....
Defendant's address

Subscribed and sworn to before me this ..... day of ...., 19...

....
Justice of the peace
By: ....
Clerk, small claims division

History: **En. Sec. 3, Ch. 501, L. 1979.**

ompiler's Comments

Codification. Sec. 6, Ch. 501, L. 1979, pro-led: "Section 3 is intended to be codified as an integral part of Title 25, chapter 35, and the provisions contained in Title 25, chapter 35, apply to section 3."

25-35-212. No further pleadings. No form of pleading other than e complaint, the order of the court/notice to defendant, and the counter-aim of the defendant, if there is one, is allowed.

History: **En. 93-349 by Sec. 5, Ch. 572, L. 1977; R.C.M. 1947, 93-349(part); amd. Sec. 4, Ch. 501, 1979; Sec. 25-35-206, MCA 1979; redes. 25-35-212 by Code Commissioner, 1979.**

25-35-213. Fees. (1) The clerk of the justice's court shall collect a fee $5:

(a) from the plaintiff upon the filing of the sworn complaint; and

(b) from the defendant upon his appearance and contesting of the complaint or execution of a counterclaim.

(2) The laws relating to paupers' affidavits apply to actions before th small claims court.

History: **En. 93-364 by Sec. 20, Ch. 572, L. 1977; R.C.M. 1947, 93-364(1), (2); amd. Sec. 5, Ch 501, L. 1979; Sec. 25-35-207, MCA 1979; redes. 25-35-213 by Code Commissioner, 1979.**

Part 3

The Trial

25-35-301. Proceedings to be informal. The hearing and dispositio of small claims actions shall be informal.

History: **En. 93-349 by Sec. 5, Ch. 572, L. 1977; R.C.M. 1947, 93-349(part).**

25-35-302. Witnesses — evidence — subpoena power. The plaintiff and the defendant may offer evidence in their behalf by witnesse appearing at such hearing in the same manner as in other cases arising i justice's court or by written evidence, and the judge may direct the production of evidence as he considers appropriate. The small claims court has the subpoena power granted to justices' courts in all civil cases.

History: **En. 93-355 by Sec. 11, Ch. 572, L. 1977; R.C.M. 1947, 93-355.**

25-35-303. Record of proceedings. All civil actions tried in a smal claims court shall be recorded either electronically or stenographically.

History: **En. 93-356 by Sec. 12, Ch. 572, L. 1977; R.C.M. 1947, 93-356.**

Part 4

Judgment — Appeal

25-35-401. Entry of judgment. Upon the conclusion of the case tried to the court, the justice shall make his findings and enter judgment.

History: **En. 93-362 by Sec. 18, Ch. 572, L. 1977; R.C.M. 1947, 93-362.**

25-35-402. Costs. The prevailing party in an action before the small claims court is entitled to his costs.

History: **En. 93-364 by Sec. 20, Ch. 572, L. 1977; R.C.M. 1947, 93-364(3).**

25-35-403. Appeal to district court — commencement and scope of. (1) If either party is dissatisfied with the judgment of the small claims court, he may appeal to the district court of the county where the judgment was rendered. An appeal shall be commenced by giving written notice to the small claims court and serving a copy of the notice of appeal on the adverse party within 10 days after entry of judgment.

(2) There shall not be a trial de novo in the district court. The appeal shall be limited to questions of law.

History: **En. 93-357 by Sec. 13, Ch. 572, L. 1977; R.C.M. 1947, 93-357(part).**

25-35-404. Record on appeal. (1) Within 30 days of the notice, the entire record of the small claims court proceedings shall be transmitted to e district court or the appeal shall be dismissed. It is the duty of the pealing party to perfect the appeal.

(2) When notice of appeal is filed, the justice shall forward the electronic cording or transcript of the stenographic record of the proceedings to the strict court, together with the original papers filed, certified by him to be curate and complete. When the record is transferred to the clerk of the dis-ct court, the justice shall notify the parties in writing.

History: En. 93-357, 93-358 by Secs. 13, 14, Ch. 572, L. 1977; R.C.M. 1947, 93-357(part), 93-358.

25-35-405. Use of transcripts or tapes by district court. The dis-ct court may hear the recording of the proceedings of the justice's court, t in its discretion it may have parts or all of the recordings transcribed at e cost of the district court. If the proceedings are stenographically taken, e notes will be transcribed in full or in designated parts as stipulated by e parties. The cost of such transcription shall be computed as prescribed law.

History: En. 93-359 by Sec. 15, Ch. 572, L. 1977; R.C.M. 1947, 93-359.

25-35-406. Execution of judgment. Proceedings to enforce or collect judgment are governed by the laws relating to execution upon justice's urt judgments.

History: En. 93-363 by Sec. 19, Ch. 572, L. 1977; R.C.M. 1947, 93-363.

TITLE 26

EVIDENCE

1.
. Statutory Provisions on Evidence.
. Subpoenas and Witnesses.
. Effect of Former Judgments and Orders.
Chapters 4 through 9 reserved.
. Montana Rules of Evidence.

CHAPTER 1

STATUTORY PROVISIONS ON EVIDENCE

Part 1 — Definitions and Miscellaneous Provisions

tion
1-101. General definitions.
1-102. Definitions — kinds of evidence.
1-103. Declaration, act, or omission which is a part of the transaction.
1-104. Evidence of third person's obligation.
1-105. Opinion evidence as to sanity.
1-106. Explanation of alterations in a writing.
1-107. When adverse party's admission of execution of a writing sufficient.
1-108. Evidence of handwriting by comparison — ancient documents.

Part 2 — Province of Court and Jury

-1-201. Questions of law.
-1-202. Questions of fact.
-1-203. Who to judge effect or value of evidence.

Part 3 — Weight and Effect of Evidence

-1-301. One witness sufficient to prove a fact.
-1-302. Witness presumed to speak the truth.
-1-303. Instructions to jury on how to evaluate evidence.

Part 4 — Burdens of Proof

-1-401. Who has the burden of producing evidence.
-1-402. Who has the burden of persuasion.
-1-403. Instructions to jury on standard of proof required to meet burden of persuasion.

Part 5 — Inferences

-1-501. Inference defined.
-1-502. When an inference arises.

Part 6 — Presumptions

-1-601. Complete list of conclusive presumptions.
-1-602. Definition and examples of disputable presumptions.
-1-603. Books containing laws presumed correct.
-1-604. When recitals in statutes conclusive.

26-1-605. Entries in official books and records prima facie evidence.
26-1-606. Entry made by officer or board prima facie evidence.
26-1-607. When writings of a decedent prima facie evidence.
Sections 26-1-608 through 26-1-620 reserved.
26-1-621. Finding of presumed death under federal Missing Persons Act prima facie evidence.
26-1-622. Official reports and records made pursuant to federal law prima facie evidence.
26-1-623. Presumption of authenticity of finding, report, or record.

Part 7 — Voluntary Payment of Claims

26-1-701. Legislative policy.
26-1-702. Person defined.
26-1-703. Voluntary partial payment of claim not an admission of fault or waiver.
26-1-704. Fact of payment and amount inadmissible as evidence.
26-1-705. Effect of payment upon final settlement.
26-1-706. Effect of payment on judgment.

Part 8 — Privileges

26-1-801. Policy to protect confidentiality in certain relations.
26-1-802. Spousal privilege.
26-1-803. Attorney-client privilege.
26-1-804. Confessions made to member of clergy.
26-1-805. Doctor-patient privilege.
26-1-806. Speech pathologist, audiologist-client privilege.
26-1-807. Psychologist-client privilege.
26-1-808. Information gathered by psychology teachers and observers.
26-1-809. Confidential communications by student to employee of educational institution.
26-1-810. Confidential communications made to public officer.

Part 9 — Media Confidentiality Act

26-1-901. Short title.
26-1-902. Extent of privilege.
26-1-903. Waiver of privilege.

Part 10 — Affidavits

26-1-1001. Affidavit defined.
26-1-1002. Permissible uses for affidavits.
26-1-1003. Affidavits made in this state — before whom taken.
26-1-1004. Affidavits made in another state — before whom taken.
26-1-1005. Affidavits made in foreign country — before whom taken.
26-1-1006. Verification of affidavit taken out of state.
Sections 26-1-1007 through 26-1-1010 reserved.
26-1-1011. Affidavit of printer or publisher as evidence of publication.
26-1-1012. Affidavit of publication — where filed, prima facie evidence.

Part 1

Definitions and Miscellaneous Provisions

26-1-101. General definitions. (1) The examination of a witness b the party producing him is denominated the "direct examination"; the examination of the same witness upon the same matter by the adverse party, th "cross-examination". The direct examination must be completed before th cross-examination begins unless the court otherwise directs.

(2) "Judicial evidence" is the means, sanctioned by law, of ascertaining in udicial proceeding the truth respecting a question of fact.

(3) A question which suggests to the witness the answer which the examng party desires is denominated a "leading question" or "suggestive quesn". On a direct examination leading questions are not allowed, except in e sound discretion of the court under special circumstances making it pear that the interests of justice require it.

(4) "Proof" is the effect of evidence, the establishment of a fact by evince.

(5) A "witness" is a person whose declaration under oath is received as idence for any purpose, whether such declaration be made on oral examition or by deposition or affidavit.

istory: (1)En. Sec. 3373, C. Civ. Proc. 1895; re-en. Sec. 8018, Rev. C. 1907; re-en. Sec. 10662, .M. 1921; Cal. C. Civ. Proc. Sec. 2045; re-en. Sec. 10662, R.C.M. 1935; Sec. 93-1901-4, R.C.M. 7; (2)En. Sec. 3100, C. Civ. Proc. 1895; re-en. Sec. 7844, Rev. C. 1907; re-en. Sec. 10488, R.C.M. 1; Cal. C. Civ. Proc. Sec. 1823; re-en. Sec. 10488, R.C.M. 1935; Sec. 93-301-1, R.C.M. 1947; n. Sec. 3374, C. Civ. Proc. 1895; re-en. Sec. 8019, Rev. C. 1907; re-en. Sec. 10663, R.C.M. 1921; . C. Civ. Proc. Sec. 2046; re-en. Sec. 10663, R.C.M. 1935; Sec. 93-1901-5, R.C.M. 1947; (4)En. . 3101, C. Civ. Proc. 1895; re-en. Sec. 7845, Rev. C. 1907; re-en. Sec. 10489, R.C.M. 1921; Cal. Civ. Proc. Sec. 1824; re-en. Sec. 10489, R.C.M. 1935; Sec. 93-301-2, R.C.M. 1947; (5)En. Sec. 0, C. Civ. Proc. 1895; re-en. Sec. 7889, Rev. C. 1907; re-en. Sec. 10533, R.C.M. 1921; Cal. C. Civ. c. Sec. 1878; re-en. Sec. 10533, R.C.M. 1935; Sec. 93-701-1, R.C.M. 1947; R.C.M. 1947, 93-301-1, 301-2, 93-701-1, 93-1901-4, 93-1901-5.

26-1-102. Definitions — kinds of evidence. (1) (a) "Conclusive evince" or "unanswerable evidence" is that which the law does not permit to contradicted. For example, the record of a court of competent jurisdiction nnot be contradicted by the parties to it.

(b) No evidence is by law made conclusive or unanswerable unless so clared by this code.

(2) "Cumulative evidence" is additional evidence of the same character to e same point.

(3) "Direct evidence" is that which proves the fact in dispute directly, thout an inference or presumption, and which in itself, if true, conclusively tablishes that fact. For example, if the fact in dispute be an agreement, the idence of a witness who was present and witnessed the making of it is rect.

(4) (a) "Indirect evidence" is that which tends to establish the fact in spute by proving another and which, though true, does not of itself concluvely establish that fact but affords an inference or presumption of its existce. For example, a witness proves an admission of the party to the fact in spute. This proves a fact from which the fact in dispute is inferred.

(b) Indirect evidence is of two kinds:

(i) inferences; and

(ii) presumptions.

(5) "Prima facie evidence" is that which suffices for the proof of a particar fact until contradicted and overcome by other evidence. For example, e certificate of a recording officer is prima facie evidence of a record, but may afterward be rejected upon proof that there is no such record.

istory: (1)(a)En. Sec. 3114, C. Civ. Proc. 1895; re-en. Sec. 7858, Rev. C. 1907; re-en. Sec. 10502, .M. 1921; Cal. C. Civ. Proc. Sec. 1837; re-en. Sec. 10502, R.C.M. 1935; Sec. 93-301-15, R.C.M. 7; (1)(b)En. Sec. 3280, C. Civ. Proc. 1895; re-en. Sec. 7971, Rev. C. 1907; re-en. Sec. 10615, R.C.M.

1921; Cal. C. Civ. Proc. Sec. 1978; re-en. Sec. 10615, R.C.M. 1935; Sec. 93-1401-9, R.C.M. 1947; (2)En. Sec. 3115, C. Civ. Proc. 1895; re-en. Sec. 7859, Rev. C. 1907; re-en. Sec. 10503, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1838; re-en. Sec. 10503, R.C.M. 1935; Sec. 93-301-16, R.C.M. 1947; (3)En. Sec. 3108, C. Civ. Proc. 1895; re-en. Sec. 7852, Rev. C. 1907; re-en. Sec. 10496, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1831; re-en. Sec. 10496, R.C.M. 1935; Sec. 93-301-9, R.C.M. 1947; (4)(a)En. Sec. 3109, C. Civ. Proc. 1895; re-en. Sec. 7853, Rev. C. 1907; re-en. Sec. 10497, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1832; re-en. Sec. 10497, R.C.M. 1935; Sec. 93-301-10, R.C.M. 1947; (4)(b)En. Sec. 3260, C. Civ. Proc. 1895; re-en. Sec. 7956, Rev. C. 1907; re-en. Sec. 10600, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1957; re-en. Sec. 10600, R.C.M. 1935; Sec. 93-1301-1, R.C.M. 1947; (5)En. Sec. 3110, C. Civ. Proc. 1895; re-en. Sec. 7854, Rev. C. 1907; re-en. Sec. 10498, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1833; re-en. Sec. 10498, R.C.M. 1935; Sec. 93-301-11, R.C.M. 1947; R.C.M. 1947, 93-301-9, 93-301-10, 93-301-11, 93-301-15, 93-301-16, 93-1301-1, 93-1401-9.

26-1-103. Declaration, act, or omission which is a part of the transaction. Where the declaration, act, or omission forms part of a transaction which is itself the fact in dispute or evidence of that fact, such declaration, act, or omission is evidence as part of the transaction.

History: En. Sec. 604, p. 196, L. 1877; re-en. Sec. 604, 1st Div. Rev. Stat. 1879; re-en. Sec. 622, 1st Div. Comp. Stat. 1887; re-en. Sec. 3126, C. Civ. Proc. 1895; re-en. Sec. 7867, Rev. C. 1907; re-en. Sec. 10511, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1850; re-en. Sec. 10511, R.C.M. 1935; R.C.M. 1947, 93-401-7.

26-1-104. Evidence of third person's obligation. Where the question in dispute between the parties is the obligation or duty of a third person, whatever would be the evidence for or against such person is prima facie evidence between the parties.

History: En. Sec. 605, p. 197, L. 1877; re-en. Sec. 605, 1st Div. Rev. Stat. 1879; re-en. Sec. 623, 1st Div. Comp. Stat. 1887; re-en. Sec. 3127, C. Civ. Proc. 1895; re-en. Sec. 7868, Rev. C. 1907; re-en. Sec. 10512, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1851; re-en. Sec. 10512, R.C.M. 1935; R.C.M. 1947, 93-401-8.

26-1-105. Opinion evidence as to sanity. In conformity with the [preceding provisions], upon a trial evidence may be given of the opinion of a subscribing witness to a writing, the validity of which is in dispute, respecting the mental sanity of the signer and the opinion of intimate acquaintanceship respecting the mental sanity of a person, the reason for the opinion being given.

History: En. Sec. 624, p. 201, L. 1877; re-en. Sec. 624, 1st Div. Rev. Stat. 1879; re-en. Sec. 642, 1st Div. Comp. Stat. 1887; re-en. Sec. 3146, C. Civ. Proc. 1895; re-en. Sec. 7887, Rev. C. 1907; re-en. Sec. 10531, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1870; re-en. Sec. 10531, R.C.M. 1935; R.C.M. 1947, 93-401-27(part)(10).

26-1-106. Explanation of alterations in a writing. The party producing a writing as genuine which has been altered or appears to have been altered after its execution in a part material to the question in dispute must account for the appearance or alteration. He may show that the alteration was made by another without his concurrence, was made with the consent of the parties affected by it, or was otherwise properly or innocently made or that the alteration did not change the meaning or language of the instrument. If he does that, he may give the writing in evidence, but not otherwise.

History: En. Sec. 365, p. 119, Bannack Stat.; re-en. Sec. 423, p. 221, L. 1867; re-en. Sec. 497, p. 136, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 12, p. 12, L. 1881; re-en. Sec. 644, 1st Div. Comp. Stat. 1887; amd. Sec. 3291, C. Civ. Proc. 1895; re-en. Sec. 7973, Rev. C. 1907; re-en. Sec. 10617, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1982; re-en. Sec. 10617, R.C.M. 1935; R.C.M. 1947, 93-1501-2.

26-1-107. When adverse party's admission of execution of a writing sufficient. Where evidence is given that the party against whom a writing is offered has at any time admitted its execution, no other evidence

the execution need be given when the instrument is one mentioned in
-1-108] or one produced from the custody of the adverse party and has
n acted upon by him as genuine.

istory: En. Sec. 3233, C. Civ. Proc. 1895; re-en. Sec. 7946, Rev. C. 1907; re-en. Sec. 10590,
M. 1921; Cal. C. Civ. Proc. Sec. 1942; re-en. Sec. 10590, R.C.M. 1935; R.C.M. 1947, 93-1101-13.

26-1-108. Evidence of handwriting by comparison — ancient
cuments. Where a writing is more than 30 years old, the comparisons
ay be made with writing purporting to be genuine, and generally re-
ected and acted upon as such, by persons having an interest in knowing
e facts.

Iistory: En. Sec. 3236, C. Civ. Proc. 1895; re-en, Sec. 7949, Rev. C. 1907; re-en.
c. 10593, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1945; re-en. Sec.
593, R.C.M. 1935; R.C.M. 1947, 93-1101-16.

Part 2

Province of Court and Jury

26-1-201. Questions of law. All questions of law, including the admis-
ility of testimony, the facts preliminary to such admission, the construc-
n of statutes and other writings, and other rules of evidence, are to be
cided by the court, and all discussions of law addressed to it. Whenever
knowledge of the court is, by this code, made evidence of a fact, the court
to declare such knowledge to the jury, which is bound to accept it.

listory: En. Sec. 3441, C. Civ. Proc. 1895; re-en. Sec. 8055, Rev. C. 1907; re-en. Sec. 10699,
.M. 1921; Cal. C. Civ. Proc. Sec. 2102; re-en. Sec. 10699, R.C.M. 1935; R.C.M. 1947, 93-2501-2.

26-1-202. Questions of fact. All questions of fact, where the trial is
jury, other than those mentioned in 26-1-201 are to be decided by the
y, and all evidence thereon is to be addressed to them, except when other-
e provided by this code.

listory: En. Sec. 3440, C. Civ. Proc. 1895; re-en. Sec. 8054, Rev. C. 1907; re-en. Sec. 10698,
.M. 1921; Cal. C. Civ. Proc. Sec. 2101; re-en. Sec. 10698, R.C.M. 1935; R.C.M. 1947, 93-2501-1.

26-1-203. Who to judge effect or value of evidence. The jury,
oject to the control of the court, in the cases specified in this code, is the
lge of the effect or value of evidence addressed to it, except when the evi-
nce is declared to be conclusive.

listory: En. Sec. 3390, C. Civ. Proc. 1895; re-en. Sec. 8028, Rev. C. 1907; re-en. Sec. 10672,
.M. 1921; Cal. C. Civ. Proc. Sec. 2061; re-en. Sec. 10672, R.C.M. 1935; R.C.M. 1947,
2001-1(part).

Part 3

Weight and Effect of Evidence

26-1-301. One witness sufficient to prove a fact. The direct evi-
nce of one witness who is entitled to full credit is sufficient for proof of
y fact, except perjury and treason.

listory: En. Sec. 598, p. 195, L. 1877; re-en. Sec. 598, 1st Div. Rev. Stat. 1879; re-en. Sec. 616,
Div. Comp. Stat. 1887; re-en. Sec. 3120, C. Civ. Proc. 1895; re-en. Sec. 7861, Rev. C. 1907; re-en.
. 10505, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1844; re-en. Sec. 10505, R.C.M. 1935; R.C.M. 1947,
401-1.

6-1-302. Witness presumed to speak the truth. A witness is pre-
ied to speak the truth. This presumption, however, may be repelled by

the manner in which he testifies, by the character of his testimony, by evidence affecting his motives or his character for truth, honesty, or integrity, or by contradictory evidence; and the jury is the exclusive judge of his credibility.

History: En. Sec. 601, p. 195, L. 1877; re-en. Sec. 601, 1st Div. Rev. Stat. 1879; re-en. Sec. 619 1st Div. Comp. Stat. 1887; re-en. Sec. 3123, C. Civ. Proc. 1895; re-en. Sec. 7864, Rev. C. 1907; re-en Sec. 10508, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1847; re-en. Sec. 10508, R.C.M. 1935; R.C.M. 1947, 93-401-4.

26-1-303. Instructions to jury on how to evaluate evidence. The jury is to be instructed by the court on all proper occasions:

(1) that their power of judging of the effect of evidence is not arbitrary but to be exercised with legal discretion and in subordination to the rules of evidence;

(2) that they are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in their minds against a less number or against a presumption or other evidence satisfying their minds;

(3) that a witness false in one part of his testimony is to be distrusted in others;

(4) that the testimony of an accomplice ought to be viewed with distrust and the evidence of the oral admissions of a party with caution;

(5) that evidence is to be estimated not only by its own intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict; and therefore

(6) that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust.

History: En. Sec. 3390, C. Civ. Proc. 1895; re-en. Sec. 8028, Rev. C. 1907; re-en. Sec. 10672 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2061; re-en. Sec. 10672, R.C.M. 1935; R.C.M. 1947 93-2001-1(part)(1) thru (4), (6), (7).

Part 4

Burdens of Proof

26-1-401. Who has the burden of producing evidence. The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.

History: En. Sec. 3290, C. Civ. Proc. 1895; re-en. Sec. 7972, Rev. C. 1907; re-en. Sec. 10616 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1981; re-en. Sec. 10616, R.C.M. 1935; R.C.M. 1947, 93-1501-1.

26-1-402. Who has the burden of persuasion. Each party mus prove his own affirmative allegations. Evidence need not be given in suppor of a negative allegation, except when such negative allegation is an essentia part of the statement of the right or title on which the cause of action i founded, nor even in such case when the allegation is a denial of the existence of a document, the custody of which belongs to the opposite party.

History: En. Sec. 623, p. 201, L. 1877; re-en. Sec. 623, 1st Div. Rev. Stat. 1879; re-en. Sec. 641 1st Div. Comp. Stat. 1887; re-en. Sec. 3145, C. Civ. Proc. 1895; re-en. Sec. 7886, Rev. C. 1907; re-e Sec. 10530, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1869; re-en. Sec. 10530, R.C.M. 1935; R.C.M. 194 93-401-26.

26-1-403. **Instructions to jury on standard of proof required to eet burden of persuasion.** The jury is to be instructed by the court on proper occasions:

1) that in civil cases the affirmative of the issue must be proved, and en the evidence is contradictory, the decision must be made according to preponderance of the evidence; and

2) that in criminal cases guilt must be established beyond reasonable ubt.

istory: En. Sec. 3390, C. Civ. Proc. 1895; re-en. Sec. 8028, Rev. C. 1907; re-en. Sec. 10672, .M. 1921; Cal. C. Civ. Proc. Sec. 2061; re-en. Sec. 10672, R.C.M. 1935; R.C.M. 1947, 2001-1(part).

Part 5

Inferences

26-1-501. **Inference defined.** An “inference” is a deduction which the ison of the jury makes from the facts proved, without an express direction the law to that effect.

istory: En. Sec. 3261, C. Civ. Proc. 1895; re-en. Sec. 7957, Rev. C. 1907; re-en. Sec. 10601, .M. 1921; Cal. C. Civ. Proc. Sec. 1958; re-en. Sec. 10601, R.C.M. 1935; R.C.M. 1947, 93-1301-2.

26-1-502. **When an inference arises.** An inference must be founded:

1) on a fact legally proved; and

2) on such a deduction from that fact as is warranted by a consideration the usual propensities or passions of men, the particular propensities or ssions of the person whose act is in question, the course of business, or the urse of nature.

istory: En. Sec. 3263, C. Civ. Proc. 1895; re-en. Sec. 7959, Rev. C. 1907; re-en. Sec. 10603, .M. 1921; Cal. C. Civ. Proc. Sec. 1960; re-en. Sec. 10603, R.C.M. 1935; R.C.M. 1947, 93-1301-4.

Part 6

Presumptions

26-1-601. **Complete list of conclusive presumptions.** The follow- presumptions and no others are deemed conclusive:

1) a malicious and guilty intent, from the deliberate commission of an lawful act for the purpose of injuring another;

2) the truth of the facts recited, from the recital in a written instrument ween the parties thereto or their successors in interest by a subsequent le; but this rule does not apply to the recital of a consideration;

3) whenever a party has, by his own declaration, act, or omission, inten- nally and deliberately led another to believe a particular thing true and to upon such belief, he cannot in any litigation arising out of such declara- n, act, or omission be permitted to falsify it;

4) a tenant is not permitted to deny the title of his landlord at the time the commencement of the relation;

5) the issue of a wife cohabiting with her husband who is not impotent ndisputably presumed to be legitimate;

(6) the judgment or order of a court, when declared by this code to be conclusive; but such judgment or order must be alleged in the pleadings i there be an opportunity to do so; if there be no such opportunity, the judgment or order may be used as evidence;

(7) any other presumption which, by statute, is expressly made conclusive.

History: En. Sec. 3265, C. Civ. Proc. 1895; re-en. Sec. 7961, Rev. C. 1907; re-en. Sec. 10605 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1962; re-en. Sec. 10605, R.C.M. 1935; R.C.M. 1947, 93-1301-6.

26-1-602. Definition and examples of disputable presumptions All other presumptions are satisfactory if uncontradicted. They are denominated "disputable presumptions" and may be controverted by other evidence The following are of that kind:

(1) that a person is innocent of crime or wrong;

(2) that an unlawful act was done with an unlawful intent;

(3) that a person intends the ordinary consequence of his voluntary act;

(4) that a person takes ordinary care of his own concerns;

(5) that evidence willfully suppressed would be adverse if produced;

(6) that higher evidence would be adverse from inferior, being produced;

(7) that money paid by one to another was due to the latter;

(8) that a thing delivered by one to another belonged to the latter;

(9) that an obligation delivered up to the debtor has been paid;

(10) that former rent or installments have been paid when a receipt for latter is produced;

(11) that things which a person possesses are owned by him;

(12) that a person is the owner of property from exercising acts of ownership over it or from common reputation of his ownership;

(13) that a person in possession of an order on himself for the paymen of money, on the delivery of a thing, has paid the money or delivered the thing accordingly;

(14) that a person acting in a public office was regularly appointed to it;

(15) that official duty has been regularly performed;

(16) that a court or judge, acting as such, whether in this state or any other state or country, was acting in the lawful exercise of its or his jurisdiction;

(17) that a judicial record, when not conclusive, does still correctly determine or set forth the rights of the parties;

(18) that all matters within an issue were laid before the jury and passed upon by them and, in like manner, that all matters within a submission to arbitration were laid before the arbitrators and passed upon by them;

(19) that private transactions have been fair and regular;

(20) that the ordinary course of business has been followed;

(21) that a promissory note or bill of exchange was given or endorsed for a sufficient consideration;

(22) that an endorsement of a negotiable promissory note or bill of exchange was made at the time and place of making the note or bill;

(23) that a writing is truly dated;

(24) that a letter duly directed and mailed was received in the regular course of the mail;

(25) identity of persons from identity of name;

(26) that a person not heard from in 7 years is dead;

(27) that acquiescence followed from a belief that the thing acquiesced in was conformable to the right or fact;

(28) that things have happened according to the ordinary course of nature and the ordinary habits of life;

(29) that persons acting as partners have entered into contract of partnership;

(30) that a man and a woman deporting themselves as husband and wife have entered into a lawful contract of marriage;

(31) that a child born in lawful wedlock, there being no divorce from bed and board, is legitimate;

(32) that a thing once proved to exist continues as long as is usual with things of that nature;

(33) that the law has been obeyed;

(34) that a document or writing more than 30 years old is genuine, when the same has been since generally acted upon as genuine by persons having an interest in the question and its custody has been satisfactorily explained;

(35) that a printed and published book purporting to be printed or published by public authority was so printed or published;

(36) that a printed and published book purporting to contain reports of cases adjudged in the tribunals of the state or country where the book is published contains correct reports of such cases;

(37) that a trustee or other person whose duty it was to convey real property to a particular person has actually conveyed to him, when such presumption is necessary to perfect the title of such person or his successor in interest;

(38) the uninterrupted use by the public of land for a burial ground for years, with the consent of the owner and without a reservation of his rights, is presumptive evidence of his intention to dedicate it to the public for that purpose;

(39) that there was a good and sufficient consideration for a written contract.

History: En. Sec. 3266, C. Civ. Proc. 1895; re-en. Sec. 7962, Rev. C. 1907; re-en. Sec. 10606, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1963; re-en. Sec. 10606, R.C.M. 1935; amd. Sec. 9, Ch. 20, L. 951; R.C.M. 1947, 93-1301-7.

26-1-603. Books containing laws presumed correct. Books printed or published under the authority of a sister state or foreign country and purporting to contain the statutes, code, or other written law of such state or country or proved to be commonly admitted in the tribunals of such state or country as evidence of the written law thereof are admissible in this state as evidence of such law.

History: En. Sec. 370, p. 120, Bannack Stat.; re-en. Sec. 428, p. 221, L. 1867; re-en. Sec. 502, p. 137, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 12, p. 12, L. 1881; re-en. Sec. 46, 1st Div. Comp. Stat. 1887; en. Sec. 3188, C. Civ. Proc. 1895; re-en. Sec. 7906, Rev. C. 1907; re-en. Sec. 10550, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1900; re-en. Sec. 10550, R.C.M. 1935; R.C.M. 947, 93-1001-12.

26-1-604. When recitals in statutes conclusive. The recitals in a public statute are conclusive evidence of the facts recited for the purpose of carrying it into effect, but no further. The recitals in a private statute are conclusive evidence between parties who claim under its provisions, but no further.

History: En. Sec. 3191, C. Civ. Proc. 1895; re-en. Sec. 7909, Rev. C. 1907; re-en. Sec. 10553, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1903; re-en. Sec. 10553, R.C.M. 1935; R.C.M. 1947, 93-1001-15.

26-1-605. Entries in official books and records prima facie evidence. Entries in public or other official books or records made in the performance of his duty by a public officer of this state or any other person in the performance of a duty specially enjoined by law are prima facie evidence of the facts stated therein.

History: En. Sec. 3208, C. Civ. Proc. 1895; re-en. Sec. 7926, Rev. C. 1907; re-en. Sec. 10570, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1920; re-en. Sec. 10570, R.C.M. 1935; R.C.M. 1947, 93-1001-32.

26-1-606. Entry made by officer or board prima facie evidence. An entry made by an officer or board of officers or under the direction and in the presence of either, in the course of official duty, is prima facie evidence of the facts stated in such entry.

History: En. Sec. 3214, C. Civ. Proc. 1895; re-en. Sec. 7932, Rev. C. 1907; re-en. Sec. 10576 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1926; re-en. Sec. 10576, R.C.M. 1935; R.C.M. 1947, 93-1001-38.

26-1-607. When writings of a decedent prima facie evidence. The entries and other writings of a decedent, made at or near the time o the transaction and in a position to know the facts stated therein, may be read as prima facie evidence of the facts stated therein, in the followin cases:

(1) when the entry was made against the interest of the person makin it;

(2) when it was made in a professional capacity and in the ordinar course of professional conduct;

(3) when it was made in the performance of a duty specially enjoined b law.

History: En. Sec. 3237, C. Civ. Proc. 1895; re-en. Sec. 7950, Rev. C. 1907; re-en. Sec. 10594 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1946; re-en. Sec. 10594, R.C.M. 1935; R.C.M. 1947, 93-1101-17.

26-1-608 through 26-1-620 reserved.

26-1-621. Finding of presumed death under federal Missin Persons Act prima facie evidence. A written finding of presumed deat made by the secretary of war, the secretary of the navy, or other officer o employee of the United States authorized to make such findings, pursuant t the federal Missing Persons Act (56 Stat. 143, 1092, and 58 Stat. 679; 5 U.S.C. App. Supp. 1001-17), as now or hereafter amended, or a duly certifie copy of such finding shall be received in any court, office, or other place i this state as prima facie evidence of the death of the person therein foun to be dead and the date, circumstances, and place of his disappearance.

History: En. Sec. 1, Ch. 14, L. 1947; R.C.M. 1947, 93-1001-39.

26-1-622. Official reports and records made pursuant to fed eral law prima facie evidence. An official written report or record, o duly certified copy thereof, that a person is missing, missing in actio interned in a neutral country, or beleaguered, besieged, or captured by a enemy or is dead or is alive, made by any officer or employee of the Unite

States authorized by the act referred to in 26-1-621 or by any other law of the United States to make same, shall be received in any court, office, or other place in this state as prima facie evidence that such person is missing, missing in action, interned in a neutral country, or beleaguered, besieged, or captured by an enemy or is dead or is alive, as the case may be.

History: **En. Sec. 2, Ch. 14, L. 1947; R.C.M. 1947, 93-1001-40.**

26-1-623. Presumption of authenticity of finding, report, or record. For the purposes of 26-1-621 and 26-1-622, any finding, report, or record or duly certified copy thereof purporting to have been signed by such an officer or employee of the United States as is described in said sections shall prima facie be deemed to have been signed and issued by such an officer or employee pursuant to law, and the person signing same shall prima facie be deemed to have acted within the scope of his authority. If a copy purports to have been certified by a person authorized by law to certify the same, such certified copy shall be prima facie evidence of his authority so to certify.

History: **En. Sec. 3, Ch. 14, L. 1947; R.C.M. 1947, 93-1001-41.**

Part 7

Voluntary Payment of Claims

26-1-701. Legislative policy. The legislature hereby declares that the health, welfare, and safety of the people of the state of Montana would be enhanced by the expeditious handling of liability claims. The legislature further declares that the handling of such claims would be expedited if voluntary payment by or on behalf of one person to or on behalf of a person who has sustained injury to his person or damage to his property could not be construed as an admission of fault or liability as to any claim arising out of the occurrence which gave rise to such injury or damage.

History: **En. Sec. 1, Ch. 222, L. 1973; R.C.M. 1947, 93-2201-7.**

26-1-702. Person defined. As used in this part, the word "person" includes any individual, partnership, joint venture, unincorporated association, private or municipal corporation, the state and its political subdivisions.

History: **En. Sec. 2, Ch. 222, L. 1973; R.C.M. 1947, 93-2201-8.**

26-1-703. Voluntary partial payment of claim not an admission of fault or waiver. No voluntary partial payment of a claim against any person based on alleged liability of that person for injury to person, including death, or damage to property arising out of any occurrence shall be construed as an admission of fault or liability or as a waiver or release of claim by the person to whom or in whose behalf such payment was made. No voluntary partial payment shall be construed to reduce the amount of damages which may be pleaded or proved in any action arising out of such occurrence.

History: **En. Sec. 3, Ch. 222, L. 1973; R.C.M. 1947, 93-2201-9(part).**

26-1-704. Fact of payment and amount inadmissible as evidence. The fact of any such voluntary payment or its amount shall not be admissible as evidence on the trial of any action arising out of such occurrence, whether on the issue of liability, the extent of the damage, or otherwise.

History: En. Sec. 3, Ch. 222, L. 1973; R.C.M. 1947, 93-2201-9(part).

26-1-705. Effect of payment upon final settlement. Upon final settlement between the parties of a claim arising out of such occurrence, the parties may make any agreement they wish with respect to all voluntary partial payments.

History: En. Sec. 3, Ch. 222, L. 1973; R.C.M. 1947, 93-2201-9(part).

26-1-706. Effect of payment on judgment. After entry of a judgment in an action for damages for personal injuries, including death, or for damage to property arising out of any occurrence, any voluntary partial payment theretofore made shall be treated as a credit against such judgment and shall be deductible from the amount of such judgment. If after partial voluntary payments are made as herein provided for, it shall be determined by a court of competent jurisdiction that the person who made such payments or on whose behalf such payments were made is liable for an amount which is less than the amount of the voluntary payments already made, such person shall have no right of action for the recovery of the amount by which the voluntary payments exceeded the amount of the judgment.

History: En. Sec. 3, Ch. 222, L. 1973; R.C.M. 1947, 93-2201-9(part).

Part 8

Privileges

26-1-801. Policy to protect confidentiality in certain relations. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the cases enumerated in this part.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; re-en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. Sec. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(part).

26-1-802. Spousal privilege. A husband cannot be examined for or against his wife without her consent or a wife for or against her husband without his consent; nor can either, during the marriage or afterward, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this exception does not apply to a civil action or proceeding by one against the other or to a criminal action or proceeding for a crime committed by one against the other.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; re-en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. Sec. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(1).

26-1-803. Attorney-client privilege. An attorney cannot, without e consent of his client, be examined as to any communication made by the ient to him or his advice given thereon in the course of professional nployment.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; . Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 0, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 07; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; -en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. c. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(2).

26-1-804. Confessions made to member of clergy. A clergyman or riest cannot, without the consent of the person making the confession, be amined as to any confession made to him in his professional character in e course of discipline enjoined by the church to which he belongs.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; . Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 0, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 07; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; -en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. c. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(3).

26-1-805. Doctor-patient privilege. A licensed physician or surgeon nnot, without the consent of his patient, be examined in a civil action as any information acquired in attending the patient which was necessary to able him to prescribe or act for the patient.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; . Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 0, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 07; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. c. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(4).

26-1-806. Speech pathologist, audiologist-client privilege. A eech pathologist or audiologist cannot, without the consent of his client, be amined in a civil action as to any communication made by the client to m.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. , 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 07; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. . 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(8).

26-1-807. Psychologist-client privilege. The confidential relations d communications between a psychologist and his client shall be placed on e same basis as provided by law for those between an attorney and his ent. Nothing in any act of the legislature shall be construed to require such ivileged communications to be disclosed.

History: En. Sec. 12, Ch. 73, L. 1971; R.C.M. 1947, 66-3212.

26-1-808. Information gathered by psychology teachers and servers. Any person who is engaged in teaching psychology in any school who, acting as such, is engaged in the study and observation of child mentality shall not, without the consent of the parent or guardian of such child being so taught or observed, testify in any civil action as to any information so obtained.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; re-en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. Sec. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(6).

26-1-809. Confidential communications by student to employee of educational institution. A counselor, psychologist, nurse, or teacher employed by any educational institution cannot be examined as to communications made to him in confidence by a duly registered student of such institution. However, this provision shall not apply where consent has been given by the student, if not a minor, or, if he is a minor, by the student and his parent or legal guardian.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871; en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs. 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C. 1907; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931; re-en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd. Sec. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(7).

26-1-810. Confidential communications made to public officer. A public officer cannot be examined as to communications made to him in official confidence when the public interests would suffer by the disclosure.

History: En. Secs. 373-377, pp. 210, 211, L. 1867; re-en. Secs. 447-451, p. 125, Cod. Stat. 1871 en. Secs. 629, 630, pp. 203, 204, L. 1877; re-en. Secs. 629, 630, 1st Div. Rev. Stat. 1879; re-en. Secs 650, 651, 1st Div. Comp. Stat. 1887; re-en. Sec. 3163, C. Civ. Proc. 1895; re-en. Sec. 7892, Rev. C 1907; re-en. Sec. 10536, R.C.M. 1921; amd. Sec. 1, Ch. 83, L. 1925; amd. Sec. 1, Ch. 130, L. 1931 re-en. Sec. 10536, R.C.M. 1935; amd. Sec. 1, Ch. 61, L. 1971; amd. Sec. 1, Ch. 318, L. 1973; amd Sec. 15, Ch. 543, L. 1975; amd. Sec. 2, Ch. 225, L. 1977; R.C.M. 1947, 93-701-4(5).

Part 9

Media Confidentiality Act

26-1-901. Short title. This part shall be known and may be cited a the "Media Confidentiality Act".

History: En. Sec. 1, Ch. 195, L. 1943; R.C.M. 1947, 93-601-1; amd. Sec. 1, Ch. 285, L. 1979.

26-1-902. Extent of privilege. (1) Without his or its consent n person, including any newspaper, magazine, press association, news agency news service, radio station, television station, or community antenna television service or any person connected with or employed by any of these fo the purpose of gathering, writing, editing, or disseminating news may b examined as to or may be required to disclose any information obtained o prepared or the source of that information in any legal proceeding if th information was gathered, received, or processed in the course of his employment or its business.

(2) A person described in subsection (1) may not be adjudged in contempt by a judicial, legislative, administrative, or any other body having th power to issue subpoenas for refusing to disclose or produce the source of an

nformation or for refusing to disclose any information obtained or prepared n gathering, receiving, or processing information in the course of his or its usiness.

History: En. Sec. 2, Ch. 195, L. 1943; amd. Sec. 1, Ch. 56, L. 1951; amd. Sec. 1, Ch. 225, L. 977; R.C.M. 1947, 93-601-2(1), (2); amd. Sec. 2, Ch. 285, L. 1979.

26-1-903. Waiver of privilege. (1) Dissemination, except as provided n subsection (2), in whole or in part does not constitute a waiver of provions of 26-1-902.

(2) If the person claiming the privilege voluntarily offers to testify or to roduce the source, with or without having been subpoenaed or ordered to stify or produce the source, before a judicial, legislative, administrative, or ther body having the power to issue subpoenas or judicially enforceable rders, he or it waives the provisions of 26-1-902. Except as provided in this ubsection, the provisions of 26-1-902 may not be waived.

History: En. Sec. 2, Ch. 195, L. 1943; amd. Sec. 1, Ch. 56, L. 1951; amd. Sec. 1, Ch. 225, L. 977; R.C.M. 1947, 93-601-2(3), (4); amd. Sec. 3, Ch. 285, L. 1979.

Part 10

Affidavits

26-1-1001. Affidavit defined. An "affidavit" is a written declaration nder oath, made without notice to the adverse party.

History: En. Sec. 3321, C. Civ. Proc. 1895; re-en. Sec. 7988, Rev. C. 1907; re-en. Sec. 10632, C.M. 1921; Cal. C. Civ. Proc. Sec. 2003; re-en. Sec. 10632, R.C.M. 1935; R.C.M. 1947, 93-1601-2.

26-1-1002. Permissible uses for affidavits. An affidavit may be sed:

(1) to verify a pleading or a paper in a special proceeding;

(2) to prove the service of a summons, notice, or other paper in an action special proceeding;

(3) to obtain a provisional remedy, the examination of a witness, or a stay proceedings;

(4) upon a motion; and

(5) in any other case expressly permitted by some other provision of this de.

History: En. Sec. 3330, C. Civ. Proc. 1895; re-en. Sec. 7992, Rev. C. 1907; re-en. Sec. 10636, C.M. 1921; Cal. C. Civ. Proc. Sec. 2009; re-en. Sec. 10636, R.C.M. 1935; R.C.M. 1947, 93-1701-1.

26-1-1003. Affidavits made in this state — before whom taken. n affidavit to be used before any court, judge, or officer of this state may taken before any judge or clerk of any court or any justice of the peace, unty clerk, or notary public in this state.

History: En. Sec. 336, p. 113, Bannack Stat.; re-en. Sec. 399, p. 215, L. 1867; re-en. Sec. 473, 130, Cod. Stat. 1871; re-en. Sec. 651, p. 208, L. 1877; re-en. Sec. 651, 1st Div. Rev. Stat. 1879; en. Sec. 672, 1st Div. Comp. Stat. 1887; re-en. Sec. 3333, C. Civ. Proc. 1895; re-en. Sec. 7995, Rev. 1907; re-en. Sec. 10639, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2012; re-en. Sec. 10639, R.C.M. 35; R.C.M. 1947, 93-1701-4.

26-1-1004. Affidavits made in another state — before whom ken. An affidavit taken in another state of the United States to be used in this state may be taken before a commissioner appointed by the governor of this state to take affidavits and depositions in such other state, before any notary public in another state, or before any judge or clerk of a court of record having a seal.

History: En. Sec. 337, p. 113, Bannack Stat.; amd. Sec. 400, p. 215, L. 1867; amd. Sec. 474, p. 130, Cod. Stat. 1871; re-en. Sec. 652, p. 208, L. 1877; re-en. Sec. 652, 1st Div. Rev. Stat. 1879; re-en. Sec. 673, 1st Div. Comp. Stat. 1887; amd. Sec. 3334, C. Civ. Proc. 1895; re-en. Sec. 7996, Rev. C. 1907; re-en. Sec. 10640, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2013; re-en. Sec. 10640, R.C.M. 1935; R.C.M. 1947, 93-1701-5.

26-1-1005. Affidavits made in foreign country — before whom taken. An affidavit taken in a foreign country to be used in this state may be taken before an ambassador, minister, consul, vice consul, or consular agent of the United States or before any judge of a court of record having a seal in such foreign country.

History: En. Sec. 338, p. 113, Bannack Stat.; amd. Sec. 401, p. 215, L. 1867; amd. Sec. 475, p. 130, Cod. Stat. 1871; re-en. Sec. 653, p. 208, L. 1877; re-en. Sec. 653, 1st Div. Rev. Stat. 1879; re-en. Sec. 674, 1st Div. Comp. Stat. 1887; amd. Sec. 3335, C. Civ. Proc. 1895; re-en. Sec. 7997, Rev. C. 1907; re-en. Sec. 10641, R.C.M. 1921, Cal. C. Civ. Proc. Sec. 2014; re-en. Sec. 10641, R.C.M. 1935; R.C.M. 1947, 93-1701-6.

26-1-1006. Verification of affidavit taken out of state. When an affidavit is taken before a judge of a court in another state or in a foreign country, the genuineness of the signature of the judge, the existence of the court, and the fact that such judge is a member thereof must be certified by the clerk of the court, under the seal thereof.

History: En. Sec. 339, p. 113, Bannack Stat.; amd. Sec. 402, p. 215, L. 1867; re-en. Sec. 476, p. 130, Cod. Stat. 1871; re-en. Sec. 654, p. 208, L. 1877; re-en. Sec. 654, 1st Div. Rev. Stat. 1879; re-en. Sec. 675, 1st Div. Comp. Stat. 1887; re-en. Sec. 3336, C. Civ. Proc. 1895; re-en. Sec. 7998, Rev. C. 1907; re-en. Sec. 10642, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2015; re-en. Sec. 10642, R.C.M. 1935; R.C.M. 1947, 93-1701-7.

26-1-1007 through 26-1-1010 reserved.

26-1-1011. Affidavit of printer or publisher as evidence of publication. Evidence of the publication of a document or notice required by law or by an order of a court or judge to be published in a newspaper may be given by the affidavit of the printer or publisher of the newspaper or his foreman or principal clerk, annexed to a copy of the document or notice, specifying the times when and the paper in which the publication was made.

History: En. Sec. 13, p. 12, L. 1881; re-en. Sec. 677, 1st Div. Comp. Stat. 1887; re-en. Sec. 3331 C. Civ. Proc. 1895; re-en. Sec. 7993, Rev. C. 1907; re-en. Sec. 10637, R.C.M. 1921; Cal. C. Civ. Proc Sec. 2010; amd. Sec. 1, Ch. 80, L. 1935; re-en. Sec. 10637, R.C.M. 1935; R.C.M. 1947, 93-1701-2.

26-1-1012. Affidavit of publication — where filed, prima facie evidence. If such affidavit be made in an action or special proceeding pending in a court, it may be filed with the court or clerk thereof. If not so made it may be filed with the clerk of the county where the newspaper is printed In either case the original affidavit or a copy thereof, certified by the judge of the court or clerk having it in custody, is prima facie evidence of the facts stated therein.

History: En. Sec. 655, p. 209, L. 1877; re-en. Sec. 655, 1st Div. Rev. Stat. 1879; re-en. Sec. 676 1st Div. Comp. Stat. 1887; re-en. Sec. 3332, C. Civ. Proc. 1895; re-en. Sec. 7994, Rev. C. 1907; re-en

. 10638, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2011; re-en. Sec. 10638, R.C.M. 1935; R.C.M. 1947, 1701-3.

CHAPTER 2

SUBPOENAS AND WITNESSES

Part 1 — Subpoenas

tion

2-101. Subpoena defined.
2-102. Issuance of subpoena.
2-103. Service of subpoena on concealed witness.
2-104. Disobedience — how punished.
2-105. Disobedience — civil damages.
2-106. Warrant to arrest and bring in disobedient witness.
2-107. Contents of warrant — execution.

Part 2 — Securing Testimony of Witness Who is a Prisoner

2-201. Court order to obtain deposition or attendance of prisoner.
2-202. Motion and affidavit required.
2-203. When production of witness may be required.

Part 3 — Duties of Witnesses

2-301. Witness required to attend when subpoenaed.
2-302. Witness required to answer questions.
2-303. Person present required to testify.

Part 4 — Protection of Witnesses

2-401. Right of witness to protection from harassment.
2-402. Witness protected from arrest when attending, going, and returning.
2-403. Arrest void — punishment and liability.
2-404. Affidavit of arrested witness — exoneration of arresting officer.
2-405. Discharge of witness from arrest by court or judge.

Part 5 — Witness Fees

2-501. Witnesses in courts of record and before certain court officers.
2-502. Witnesses in courts not of record — civil actions.
2-503. Witnesses in courts not of record — criminal actions and on coroner's inquests.
2-504. Interpreters to be paid as witnesses.
2-505. Expert witnesses.
2-506. Fees paid by party subpoenaing in civil actions.
2-507. Demand for advance payment of witness fees in civil action.
2-508. Witnesses on behalf of state or county — advance payment not required.
2-509. Certificate of clerk to witness to obtain payment.
2-510. Application of sections exempting from advance payment.

Part 1

Subpoenas

26-2-101. Subpoena defined. The process by which the attendance of witness is required is by a subpoena. It is a writ or order directed to a person and requiring his attendance at a particular time and place to testi as a witness. It may also require him to bring with him any books, doc ments, or other things under his control, which he is bound by law to pr duce in evidence.

History: En. Sec. 380, p. 212, L. 1867; re-en. Sec. 454, p. 127, Cod. Stat. 1871; re-en. Sec. 63 p. 204, L. 1877; re-en. Sec. 633, 1st Div. Rev. Stat. 1879; re-en. Sec. 654, 1st Div. Comp. Stat. 18 en. Sec. 3300, C. Civ. Proc. 1895; re-en. Sec. 7974, Rev. C. 1907; re-en. Sec. 10618, R.C.M. 19 Cal. C. Civ. Proc. Sec. 1985; re-en. Sec. 10618, R.C.M. 1935; R.C.M. 1947, 93-1501-3.

26-2-102. Issuance of subpoena. The subpoena is issued as follows:

(1) To require attendance before a court or at the trial of an iss therein, it is issued under the seal of the court before which the attendan is required or in which the issue is pending.

(2) To require attendance out of the court before a judge, justice, or oth officer authorized to administer oaths or take testimony in any matter und the laws of this state, it is issued by the judge, justice, or other officer befo whom the attendance is required.

(3) To require attendance before a commissioner appointed to take test mony by a court of a foreign country, of the United States, of any other sta in the United States, or of any other district or county within this state before any officer or officers empowered by the laws of the United States take testimony, it may be issued by any judge or justice of the peace places within his respective jurisdiction, with like power to enforce atten ance and, upon certificate of contumacy to said court, to punish contempt his process as such judge or justice could exercise if the subpoena direct the attendance of the witness before his court in a matter pending therein.

History: En. Sec. 322, p. 111, Bannack Stat.; en. Sec. 381, p. 212, L. 1867; re-en. Sec. 455, 127, Cod. Stat. 1871; re-en. Sec. 634, p. 204, L. 1877; re-en. Sec. 634, 1st Div. Rev. Stat. 1879; re- Sec. 655, 1st Div. Comp. Stat. 1887; re-en. Sec. 3301, C. Civ. Proc. 1895; re-en. Sec. 7975, Rev. 1907; re-en. Sec. 10619, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1986; re-en. Sec. 10619, R.C.M. 19 R.C.M. 1947, 93-1501-4.

26-2-103. Service of subpoena on concealed witness. If a witne is concealed in a building or vessel so as to prevent the service of a subpoe upon him, any court or judge or any officer issuing a subpoena may, up proof by affidavit of the concealment and of the materiality of the witnes make an order that the sheriff of the county serve the subpoena and t sheriff must serve it accordingly and, for that purpose, may break into t building or vessel where the witness is concealed.

History: En. Sec. 383, p. 212, L. 1867; re-en. Sec. 457, p. 127, Cod. Stat. 1871; re-en. Sec. 6 p. 205, L. 1877; re-en. Sec. 636, 1st Div. Rev. Stat. 1879; re-en. Sec. 657, 1st Div. Comp. Stat. 18 re-en. Sec. 3303, C. Civ. Proc. 1895; re-en. Sec. 7977, Rev. C. 1907; re-en. Sec. 10621, R.C.M. 19 Cal. C. Civ. Proc. Sec. 1988; re-en. Sec. 10621, R.C.M. 1935; R.C.M. 1947, 93-1501-6.

26-2-104. Disobedience — how punished. Disobedience to a su poena or a refusal to be sworn or to answer as a witness or to subscribe affidavit or deposition, when required, may be punished as a contempt the court or officer issuing the subpoena or requiring the witness to be swor and if the witness be a party, his complaint or answer may be stricken out.

History: En. Sec. 329, p. 112, Bannack Stat.; amd. Sec. 387, p. 213, L. 1867; re-en. Sec. 461, 128, Cod. Stat. 1871; re-en. Sec. 640, p. 206, L. 1877; re-en. Sec. 640, 1st Div. Rev. Stat. 1879; re- Sec. 661, 1st Div. Comp. Stat. 1887; re-en. Sec. 3306, C. Civ. Proc. 1895; re-en. Sec. 7980, Rev. 1907; re-en. Sec. 10624, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1991; re-en. Sec. 10624, R.C.M. 19 R.C.M. 1947, 93-1501-9.

26-2-105. Disobedience — civil damages. A witness disobeying a bpoena also forfeits to the party aggrieved the sum of $100 and all dam- es which he may sustain by the failure of the witness to attend, which for- iture and damages may be recovered in a civil action.

History: En. Sec. 330, p. 112, Bannack Stat.; re-en. Sec. 388, p. 213, L. 1867; re-en. Sec. 462, 128, Cod. Stat. 1871; re-en. Sec. 641, p. 206, L. 1877; re-en. Sec. 641, 1st Div. Rev. Stat. 1879; en. Sec. 662, 1st Div. Comp. Stat. 1887; re-en. Sec. 3307, C. Civ. Proc. 1895; re-en. Sec. 7981, Rev. . 1907; re-en. Sec. 10625, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1992; re-en. Sec. 10625, R.C.M. 35; R.C.M. 1947, 93-1501-10.

26-2-106. Warrant to arrest and bring in disobedient witness. case of a failure of a witness to attend, the court or officer issuing the sub- ena, upon proof of the service thereof and of the failure of the witness, ay issue a warrant to the sheriff of the county to arrest the witness and ing him before the court or officer where his attendance was required.

History: En. Sec. 331, p. 112, Bannack Stat.; amd. Sec. 389, p. 213, L. 1867; re-en. Sec. 463, p. 3, Cod. Stat. 1871; re-en. Sec. 642, p. 207, L. 1877; re-en. Sec. 642, 1st Div. Rev. Stat. 1879; re-en. . 663, 1st Div. Comp. Stat. 1887; re-en. Sec. 3308, C. Civ. Proc. 1895; re-en. Sec. 7982, Rev. C. 07; re-en. Sec. 10626, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1993; re-en. Sec. 10626, R.C.M. 1935; M. 1947, 93-1501-11.

26-2-107. Contents of warrant — execution. Every warrant of com- itment issued by a court or officer pursuant to this part must specify erein, particularly, the cause of the commitment; and if it be for refusing answer a question, such question must be stated in the warrant. Every urrant to arrest or commit a witness pursuant to this part must be directed the sheriff of the county where the witness may be and must be executed him in the same manner as process by the district court.

History: En. Sec. 643, p. 207, L. 1877; re-en. Sec. 643, 1st Div. Rev. Stat. 1879; re-en. Sec. 664, Div. Comp. Stat. 1887; re-en. Sec. 3309, C. Civ. Proc. 1895; re-en. Sec. 7983, Rev. C. 1907; re-en. . 10627, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1994; re-en. Sec. 10627, R.C.M. 1935; R.C.M. 1947, 1501-12.

Part 2

Securing Testimony of Witness Who is a Prisoner

26-2-201. Court order to obtain deposition or attendance of isoner. If the witness be a prisoner confined in a jail or prison within this ate, an order for his examination in the prison upon deposition or for his nporary removal and production before a court or officer for the purpose being orally examined may be made as follows:

(1) by the court itself in which the action or special proceeding is pending less it be a justice's court;

(2) by a justice of the supreme court or a judge of the district court of e county where the action or proceeding is pending if pending before a stice's court or before a judge or other person out of court.

History: En. Sec. 332, p. 112, Bannack Stat.; re-en. Sec. 390, p. 213, L. 1867; re-en. Sec. 464, 128, Cod. Stat. 1871; re-en. Sec. 644, p. 207, L. 1877; re-en. Sec. 644, 1st Div. Rev. Stat. 1879; n. Sec. 665, 1st Div. Comp. Stat. 1887; amd. Sec. 3310, C. Civ. Proc. 1895; re-en. Sec. 7984, Rev. . 1907; re-en. Sec. 10628, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1995; re-en. Sec. 10628, R.C.M. 5; R.C.M. 1947, 93-1501-13.

26-2-202. Motion and affidavit required. Such order can only be ade on the motion of a party, upon affidavit showing the nature of the action or proceeding, the testimony expected from the witness, and its mat riality.

History: En. Sec. 333, p. 113, Bannack Stat.; re-en. Sec. 391, p. 213, L. 1867; re-en. Sec. 4 p. 128, Cod. Stat. 1871; re-en. Sec. 645, p. 207, L. 1877; re-en. Sec. 645, 1st Div. Rev. Stat. 18 re-en. Sec. 666, 1st Div. Comp. Stat. 1887; re-en. Sec. 3311, C. Civ. Proc. 1895; re-en. Sec. 7985, R C. 1907; re-en. Sec. 10629, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1996; re-en. Sec. 10629, R.C. 1935; R.C.M. 1947, 93-1501-14.

26-2-203. When production of witness may be required. If t witness be imprisoned in the county where the action or proceeding is pen ing, his production may be required. In all other cases his examination, wh allowed, must be taken upon deposition.

History: En. Sec. 334, p. 113, Bannack Stat.; re-en. Sec. 392, p. 213, L. 1867; re-en. Sec. 4 p. 129, Cod. Stat. 1871; re-en. Sec. 646, p. 207, L. 1877; re-en. Sec. 646, 1st Div. Rev. Stat. 18 re-en. Sec. 667, 1st Div. Comp. Stat. 1887; re-en. Sec. 3312, C. Civ. Proc. 1895; re-en. Sec. 7986, R C. 1907; re-en. Sec. 10630, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1997; re-en. Sec. 10630, R.C. 1935; R.C.M. 1947, 93-1501-15.

Part 3

Duties of Witnesses

26-2-301. Witness required to attend when subpoenaed. witness served with a subpoena must attend at the time appointed, with a papers under his control required by the subpoena, and answer all pertine and legal questions and, unless sooner discharged, must remain until t testimony is closed.

History: En. Sec. 327, p. 112, Bannack Stat.; re-en. Sec. 385, p. 213, L. 1867; re-en. Sec. 4 p. 128, Cod. Stat. 1871; re-en. Sec. 638, p. 206, L. 1877; re-en. Sec. 638, 1st Div. Rev. Stat. 18 re-en. Sec. 659, 1st Div. Comp. Stat. 1887; amd. Sec. 3400, C. Civ. Proc. 1895; re-en. Sec. 8029, R C. 1907; re-en. Sec. 10673, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2064; re-en. Sec. 10673, R.C. 1935; R.C.M. 1947, 93-2101-1.

26-2-302. Witness required to answer questions. A witness mu answer questions legal and pertinent to the matter in issue though his answ may establish a claim against himself, but he need not give an answer whi will have a tendency to subject him to punishment for a felony, nor need give an answer which will have a direct tendency to degrade his charact unless it be to the very fact in issue or to a fact from which the fact in iss would be presumed. But a witness must answer as to the fact of his previo conviction for felony.

History: En. Sec. 328, p. 112, Bannack Stat.; re-en. Sec. 386, p. 213, L. 1867; re-en. Sec. 4 p. 128, Cod. Stat. 1871; re-en. Sec. 639, p. 206, L. 1877; re-en. Sec. 639, 1st Div. Rev. Stat. 18 re-en. Sec. 660, 1st Div. Comp. Stat. 1887; amd. Sec. 3401, C. Civ. Proc. 1895; re-en. Sec. 8030, F C. 1907; re-en. Sec. 10674, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2065; re-en. Sec. 10674, R.C.M 19 R.C.M. 1947, 93-2101-2.

26-2-303. Person present required to testify. A person present court or before a judicial officer may be required to testify in the same ma ner as if he were in attendance upon a subpoena issued by such court or of cer.

History: En. Sec. 326, p. 112, Bannack Stat.; re-en. Sec. 384, p. 212, L. 1867; re-en. Sec. 4 p. 128, Cod. Stat. 1871; re-en. Sec. 637, p. 206, L. 1877; re-en. Sec. 637, 1st Div. Rev. Stat. 18 re-en. Sec. 658, 1st Div. Comp. Stat. 1887; re-en. Sec. 3305, C. Civ. Proc. 1895; re-en. Sec. 7979, F

1907; re-en. Sec. 10623, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1990; re-en. Sec. 10623, R.C.M. 5; R.C.M. 1947, 93-1501-8.

Part 4

Protection of Witnesses

26-2-401. Right of witness to protection from harassment. It is e right of a witness to be protected from irrelevant, improper, or insulting estions and from harsh or insulting demeanor; to be detained only so long the interests of justice require it; to be examined only as to matters legal d pertinent to the issue.

istory: En. Sec. 3402, C. Civ. Proc. 1895; re-en. Sec. 8031, Rev. C. 1907; re-en. Sec. 10675, .M. 1921; Cal. C. Civ. Proc. Sec. 2066; re-en. Sec. 10675, R.C.M. 1935; R.C.M. 1947, 93-2101-3.

26-2-402. Witness protected from arrest when attending, ing, and returning. Every person who has been, in good faith, served th a subpoena to attend as a witness before a court, judge, commissioner, eree, or other person in a case where the disobedience of the witness may punished as a contempt is exonerated from arrests in a civil action while ing to the place of attendance, necessarily remaining there, and returning erefrom.

istory: En. Sec. 335, p. 113, Bannack Stat.; amd. Sec. 393, p. 213, L. 1867; re-en. Sec. 467, p. , Cod. Stat. 1871; re-en. Sec. 674, p. 215, L. 1877; re-en. Sec. 3403, C. Civ. Proc. 1895; re-en. . 8032, Rev. C. 1907; re-en. Sec. 10676, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2067; re-en. Sec. 76, R.C.M. 1935; R.C.M. 1947, 93-2101-4.

26-2-403. Arrest void — punishment and liability. The arrest of a tness contrary to 26-2-402 is void and, when willfully made, is a contempt the court; and the person making it is responsible to the witness arrested double the amount of the damages which may be assessed against him d is also liable to an action at the suit of the party serving the witness th a subpoena for the damages sustained by him in consequence of the est.

istory: En. Sec. 3404, C. Civ. Proc. 1895; re-en. Sec. 8033, Rev. C. 1907; re-en. Sec. 10677, .M. 1921; Cal. C. Civ. Proc. Sec. 2068; re-en. Sec. 10677, R.C.M. 1935; R.C.M. 1947, 93-2101-5.

26-2-404. Affidavit of arrested witness — exoneration of resting officer. (1) An officer is not liable to the party for making the est in ignorance of the facts creating the exoneration but is liable for any bsequent detention of the party if such party claim the exemption and ke an affidavit stating that:

(a) he has been served with a subpoena to attend as a witness before a rt, officer, or other person, specifying the same, the place of attendance, d the action or proceeding in which the subpoena was issued;

(b) he has not thus been served by his own procurement with the inten- n of avoiding arrest; and

(c) he is at the time going to the place of attendance, returning there- m, or remaining there in obedience to the subpoena.

(2) The affidavit may be taken by the officer and exonerates him from bility for discharging the witness when arrested.

istory: En. Sec. 394, p. 214, L. 1867; re-en. Sec. 468, p. 129, Cod. Stat. 1871; rep. Sec. 674, 15, L. 1877; re-en. Sec. 3405, C. Civ. Proc. 1895; re-en. Sec. 8034, Rev. C. 1907; re-en. Sec. 10678, .M. 1921; Cal. C Civ. Proc. Sec. 2069; re-en. Sec. 10678, R.C.M. 1935; R.C.M. 1947, 93-2101-6.

26-2-405. Discharge of witness from arrest by court or judg The court or officer issuing the subpoena and the court or officer befor whom the attendance is required may discharge the witness from an arres made in violation of 26-2-402. If the court has adjourned before the arres or before application for discharge, a judge of the court may grant the dis charge.

History: En. Sec. 3406, C. Civ. Proc. 1895; re-en. Sec. 8035, Rev. C. 1907; re-en. Sec. 1067 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2070; re-en. Sec. 10679, R.C.M. 1935; R.C.M. 1947, 93-2101-7.

Part 5

Witness Fees

26-2-501. Witnesses in courts of record and before certai court officers. (1) Witness fees are as follows:

(a) for attending in any civil or criminal action or proceeding before an court of record, referee, or officer authorized to take depositions or commis sioners to assess damages or otherwise, for each day, $10;

(b) for mileage in traveling to the place of trial or hearing, each way, f each mile, a mileage allowance as provided in 2-18-503.

(2) However, no officer of the United States, the state of Montana, or an county, incorporated city, or town within the limits of the state of Montan shall receive any per diem when testifying in a criminal proceeding, and n witness shall receive fees in any more than one criminal case on the sam day.

History: En. Sec. 4648, Pol. C. 1895; re-en. Sec. 3182, Rev. C. 1907; re-en. Sec. 4936, R.C.M 1921; amd. Sec. 2, Ch. 18, L. 1935; re-en. Sec. 4936, R.C.M. 1935; amd. Sec. 2, Ch. 117, L. 196 amd. Sec. 3, Ch. 332, L. 1971; amd. Sec. 11, Ch. 439, L. 1975; R.C.M. 1947, 25-404.

26-2-502. Witnesses in courts not of record — civil actions. Wi nesses in courts not of record in civil actions and proceedings shall recei $3 for each day's actual attendance and mileage as provided in 2-18-503 f each mile actually traveled in going from their residences by the usual tra eled route to the court and return.

History: En. Sec. 3, Ch. 48, L. 1903; re-en. Sec. 3186, Rev. C. 1907; re-en. Sec. 4941, R.C.M 1921; amd. Sec. 3, Ch. 18, L. 1935; re-en. Sec. 4941, R.C.M. 1935; amd. Sec. 4, Ch. 332, L. 197 amd. Sec. 7, Ch. 420, L. 1975; R.C.M. 1947, 25-409.

26-2-503. Witnesses in courts not of record — criminal action and on coroner's inquests. Witnesses in courts not of record in crimin actions and on coroner's inquests shall receive $3 per day for actual atten ance and mileage as provided in 2-18-503 for each mile actually and necessa ily traveled from their places of residence to the court and return.

History: En. Sec. 4, Ch. 48, L. 1903; re-en. Sec. 3187, Rev. C. 1907; re-en. Sec. 4942, R.C.M 1921; amd. Sec. 4, Ch. 18, L. 1935; re-en. Sec. 4942, R.C.M. 1935; amd. Sec. 5, Ch. 332, L. 197 amd. Sec. 8, Ch. 420, L. 1975; R.C.M. 1947, 25-410.

26-2-504. Interpreters to be paid as witnesses. Interpreters an translators must receive the same fees as witnesses.

History: En. Sec. 4657, Pol. C. 1895; re-en. Sec. 3191, Rev. C. 1907; re-en. Sec. 4946, R.C.M 1921; re-en. Sec. 4946, R.C.M. 1935; R.C.M. 1947, 25-413.

26-2-505. Expert witnesses. An expert is a witness and receives t same compensation as a witness.

History: En. Sec. 4658, Pol. C. 1895; re-en. Sec. 3192, Rev. C. 1907; re-en. Sec. 4947, R.C.M 1921; re-en. Sec. 4947, R.C.M. 1935; R.C.M. 1947, 25-414.

26-2-506. Fees paid by party subpoenaing in civil actions. The es and compensation of a witness in all civil actions must be paid by the rty who caused him to be subpoenaed.

History: En. Sec. 4654, Pol. C. 1895; re-en. Sec. 3188, Rev. C. 1907; re-en. Sec. 4943, R.C.M. 21; re-en. Sec. 4943, R.C.M. 1935; R.C.M. 1947, 25-411.

26-2-507. Demand for advance payment of witness fees in civil tion. No witness shall be obliged to attend court or before a referee, offi- r authorized to take depositions, or commissioner, when subpoenaed, unless s mileage and fees for 1 day's attendance are tendered or paid to him on s demanding the same or unless his fees for attendance thereafter for each y are tendered or paid to him on demand. The fees of witnesses paid may taxed as costs against the losing party.

History: En. Sec. 4655, Pol. C. 1895; re-en. Sec. 3189, Rev. C. 1907; re-en. Sec. 4944, R.C.M. 21; amd. Sec. 1, Ch. 71, L. 1927; re-en. Sec. 4944, R.C.M. 1935; R.C.M. 1947, 25-412.

26-2-508. Witnesses on behalf of state or county — advance yment not required. The attorney general or any county attorney is thorized to cause subpoenas to be issued and compel the attendance of tnesses on behalf of the state or county without paying or tendering fees advance to either officers or witnesses; and any witness refusing to or fail- g to attend, after being served with a subpoena, may be proceeded against d is liable in the same manner as is provided by law in other cases where es have been tendered or paid.

History: En. Sec. 4620, Pol. C. 1895; re-en. Sec. 3153, Rev. C. 1907; re-en. Sec. 4902, R.C.M. 21; re-en. Sec. 4902, R.C.M. 1935; R.C.M. 1947, 25-218.

26-2-509. Certificate of clerk to witness to obtain payment. The rk of any court before which any witness shall have attended on behalf of e state or county in any civil action must give to such witness a certificate der seal of travel and attendance, which shall entitle him to receive the ount therein stated from the state or county treasurer.

History: En. Sec. 4621, Pol. C. 1895; re-en. Sec. 3154, Rev. C. 1907; re-en. Sec. 4903, R.C.M. 21; re-en. Sec. 4903, R.C.M. 1935; R.C.M. 1947, 25-219.

26-2-510. Application of sections exempting from advance pay- ent. The provisions of 26-2-508 and 26-2-509 shall extend to all actions d proceedings brought in the name of the attorney general or any other rson or persons for the benefit of the state or county.

History: En. Sec. 4622, Pol. C. 1895; re-en. Sec. 3155, Rev. C. 1907; re-en. Sec. 4904, R.C.M. 21; re-en. Sec. 4904, R.C.M. 1935; R.C.M. 1947, 25-220.

CHAPTER 3

EFFECT OF FORMER JUDGMENTS AND ORDERS

Part 1 — General Provisions

ction

3-101. Kinds of jurisdiction necessary to sustain a record.
3-102. What considered adjudged in a judgment.

26-3-103. When parties are considered to be the same.
26-3-104. Principal bound when surety bound.
26-3-105. Impeachment of a judicial record.

Part 2 — Effect of Specific Kinds of Judicial Records

26-3-201. Effect of judgment or final order — when conclusive.
26-3-202. Effect of other judicial orders — when disputable presumption created.
26-3-203. Effect of judicial record of another state.
26-3-204. Effect of judicial record of foreign court of admiralty.
26-3-205. Effect of judgments of other foreign tribunals.

Part 1

General Provisions

26-3-101. Kinds of jurisdiction necessary to sustain a record The jurisdiction sufficient to sustain a record is jurisdiction over the cause over the parties, and over the thing, when a specific thing is the subject o the judgment.

History: En. Sec. 3205, C. Civ. Proc. 1895; re-en. Sec. 7923, Rev. C. 1907; re-en. Sec. 10567 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1917; re-en. Sec. 10567, R.C.M. 1935; R.C.M. 1947, 93-1001-29.

26-3-102. What considered adjudged in a judgment. That only i deemed to have been adjudged in a former judgment which appears upon it face to have been so adjudged or which was actually and necessarily include therein or necessary thereto.

History: En. Sec. 3199, C. Civ. Proc. 1895; re-en. Sec. 7917, Rev. C. 1907; re-en. Sec. 10561 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1911; re-en. Sec. 10561, R.C.M. 1935; R.C.M. 1947, 93-1001-23.

26-3-103. When parties are considered to be the same. The parties are deemed to be the same when those between whom the evidence i offered were on opposite sides in the former case and a judgment or othe determination could in that case have been made between them alone though other parties were joined with both or either.

History: En. Sec. 3198, C. Civ. Proc. 1895; re-en. Sec. 7916, Rev. C. 1907; re-en. Sec. 1056 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1910; re-en. Sec. 10560, R.C.M. 1935; R.C.M. 1947, 93-1001-22

26-3-104. Principal bound when surety bound. Whenever, pursuant to 26-3-102, 26-3-103, 26-3-201, and 26-3-202, a party is bound by record and such party stands in the relation of a surety for another, th latter is also bound from the time that he has notice of the action or proceeding and an opportunity at the surety's request to join in the defense.

History: En. Sec. 3200, C. Civ. Proc. 1895; re-en. Sec. 7918, Rev. C. 1907; re-en. Sec. 1056 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1912; re-en. Sec. 10562, R.C.M. 1935; R.C.M. 1947, 93-1001-24

26-3-105. Impeachment of a judicial record. Any judicial recor may be impeached by evidence of a want of jurisdiction in the court or judicial officer, of collusion between the parties, or of fraud in the party offerin the record in respect to the proceedings.

History: En. Sec. 3204, C. Civ. Proc. 1895; re-en. Sec. 7922, Rev. C. 1907; re-en. Sec. 1056 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1916; re-en. Sec. 10566, R.C.M. 1935; R.C.M. 1947, 93-1001-28

Part 2

Effect of Specific Kinds of Judicial Records

26-3-201. Effect of judgment or final order — when conclusive. 'he effect of a judgment or final order in an action or special proceeding efore a court or judge of this state or of the United States having jurisdic-ion to pronounce the judgment or order is as follows:

(1) In case of a judgment or order against a specific thing, or in respect ɔ the probate of a will or the administration of the estate of a decedent, or ı respect to the personal, political, or legal condition or relation of a partic-lar person, the judgment or order is conclusive upon the title to the thing, ıe will or administration, or the condition or relation of the person.

(2) In other cases, the judgment or order is, in respect to the matter irectly adjudged, conclusive between the parties and their successors in ıterest by title subsequent to the commencement of the action or special roceeding, litigating for the same thing under the same title and in the same apacity, provided they have notice, actual or constructive, of the pendency f the action or proceeding.

History: En. Sec. 3196, C. Civ. Proc. 1895; re-en. Sec. 7914, Rev. C. 1907; re-en. Sec. 10558, .C.M. 1921; Cal. C. Civ. Proc. Sec. 1908; re-en. Sec. 10558, R.C.M. 1935; R.C.M. 1947, 93-1001-20.

26-3-202. Effect of other judicial orders — when disputable resumption created. Other judicial orders of a court or judge of this tate or of the United States create a disputable presumption, according to he matter directly determined, between the same parties and their repre-entatives and successors in interest by title subsequent to the commence-ıent of the action or special proceeding, litigating for the same thing under he same title and in the same capacity.

History: En. Sec. 3197, C. Civ. Proc. 1895; re-en. Sec. 7915, Rev. C. 1907; re-en. Sec. 10559, .C.M. 1921; Cal. C. Civ. Proc. Sec. 1909; re-en. Sec. 10559, R.C.M. 1935; R.C.M. 1947, 93-1001-21.

26-3-203. Effect of judicial record of another state. The effect of judicial record of a sister state is the same in this state as in the state 'here it was made, except that it can only be enforced here by an action or pecial proceeding and except that the authority of a guardian or committee r of an executor or administrator does not extend beyond the jurisdiction f the government under which he was invested with his authority.

History: En. Sec. 3201, C. Civ. Proc. 1895; re-en. Sec. 7919, Rev. C. 1907; re-en. Sec. 10563, .C.M. 1921; Cal. C. Civ. Proc. Sec. 1913; re-en. Sec. 10563, R.C.M. 1935; R.C.M. 1947, 93-1001-25.

26-3-204. Effect of judicial record of foreign court of admi-alty. The effect of the judicial record of a court of admiralty of a foreign ountry is the same as if it were the record of a court of admiralty of the Jnited States.

History: En. Sec. 3202, C. Civ. Proc. 1895; re-en. Sec. 7920, Rev. C. 1907; re-en. Sec. 10564, .C.M. 1921; Cal. C. Civ. Proc. Sec. 1914; re-en. Sec. 10564, R.C.M. 1935; R.C.M. 1947, 93-1001-26.

26-3-205. Effect of judgments of other foreign tribunals. The ffect of the judgment of any other tribunal of a foreign country having juris-iction to pronounce the judgment is as follows:

(1) In case of a judgment against a specific thing, the judgment is conclusive upon the title to the thing.

(2) In case of a judgment against a person, the judgment is presumptive evidence of a right as between the parties and their successors in interest by a subsequent title and can only be repelled by evidence of a want of jurisdiction, want of notice to the party, collusion, fraud, or clear mistake of law or fact.

History: En. Sec. 3203, C. Civ. Proc. 1895; re-en. Sec. 7921, Rev. C. 1907; re-en. Sec. 10565, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1915; re-en. Sec. 10565, R.C.M. 1935; R.C.M. 1947, 93-1001-27.

CHAPTERS 4 THROUGH 9

RESERVED

CHAPTER 10

MONTANA RULES OF EVIDENCE

Article I — General Provisions

Rule
100. Short title.
101. Scope.
102. Purpose and construction.
103. Rulings on evidence.
104. Preliminary questions of admissibility.
105. Limited admissibility.
106. Remainder of or related acts, writings, or statements.

Article II — Judicial Notice

201. Judicial notice of facts.
202. Judicial notice of law.

Article III — Presumptions

301. Presumptions in general.
302. Applicability of federal law in civil cases.

Article IV — Relevancy and Its Limits

401. Definition of relevant evidence.
402. Relevant evidence generally admissible; irrelevant evidence inadmissible.
403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.
404. Character evidence not admissible to prove conduct, exceptions; other crimes; character in issue.
405. Methods of proving character.
406. Habit; routine practice.
407. Subsequent remedial measures.
408. Compromise and offers to compromise.
409. Payment of expenses.
410. Offer to plead guilty; nolo contendere; withdrawn plea of guilty.
411. Liability insurance.

Article V — Privileges

501. Privileges recognized only as provided.

502. Identity of informer.
503. Waiver of privilege by voluntary disclosure.
504. Privileged matter disclosed under compulsion or without opportunity to claim the privilege.
505. Comment upon or inference from claim of privilege.

Article VI — Witnesses

601. Competency in general; disqualification.
602. Lack of personal knowledge.
603. Oath or affirmation.
604. Interpreters.
605. Competency of judge as witness.
606. Competency of juror as witness.
607. Who may impeach; party not bound by testimony.
608. Evidence of character and conduct of witness.
609. Impeachment by evidence of conviction of crime.
610. Religious beliefs or opinions.
611. Mode and order of interrogation and presentation; re-examination and recall; confrontation.
612. Writings used to refresh memory.
613. Prior statements of witnesses.
614. Calling and interrogation of witnesses by court.
615. Exclusion of witnesses.

Article VII — Opinions and Expert Testimony

701. Opinion testimony by lay witnesses.
702. Testimony by experts.
703. Basis of opinion testimony by experts.
704. Opinions on ultimate issue.
705. Disclosure of facts or data underlying expert opinion.

Article VIII — Hearsay

801. Definitions.
802. Hearsay rule.
803. Hearsay exceptions: availability of declarant immaterial.
804. Hearsay exceptions: declarant unavailable.
805. Hearsay within hearsay.
806. Attacking and supporting the credibility of declarant.

Article IX — Authentication and Identification

901. Requirement of authentication or identification.
902. Self-authentication.
903. Subscribing witness' testimony unnecessary.

Article X — Contents of Writings, Recordings, and Photographs

001. Definitions.
002. Requirement of original.
003. Admissibility of duplicates, copies of certain entries.
004. Admissiblity of other evidence of contents.
005. Public records.
006. Summaries.
007. Testimony or written admission of party.
008. Functions of court and jury.

Article I
General Provisions

Rule 100. Short title.

These rules may be known and cited as the Montana Rules of Evidence.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Compiler's Comments

Superseded Statutes. Supreme Court Order 12729 (July 10, 1979) provided:

"1. Pursuant to Article VII, Section 2, of the 1972 Montana Constitution, the following sections of the Revised Codes of Montana, 1947, are declared to have been superseded by the provisions of the Montana Rules of Evidence:

Sections 93-301-3; 93-301-4; 93-301-5; 93-301-6; 93-301-7; 93-301-8; 93-301-12; 93-301-13; 93-301-14; 93-301-17; 93-401-2; 93-401-3; 93-401-5; 93-401-6; 93-401-9; 93-401-10; 93-401-11; 93-401-12; 93-401-20; 93-401-24; 93-401-25; 93-401-27; 93-501-1 through 93-501-8; 93-701-2; 93-701-3; 93-701-5; 93-701-6; 93-801-1 through 93-801-6; 93-901-1 through 93-901-5; 93-1001-13; 93-1001-14; 93-1001-17; 93-1001-18; 93-1001-19; 93-1001-30; 93-1001-31; 93-1001-33 and 93-1001-34; 93-1001-35; 93-1001-36; 93-1101-8; 93-1101-9; 93-1101-10; 93-1101-11; 93-1101-12; 93-1101-14; 93-1101-15; 93-1101-18; 93-1101-19; 93-1101-21; 93-1201-1; 93-1301-3; 93-1301-5; 93-1401-1; 93-1401-2; 93-1601-1; 93-1601-5; 93-1901-1; 93-1901-2; 93-1901-3; 93-1901-6; 93-1901-7; 93-1901-8; 93-1901-9; 93-1901-10; 93-1901-11; 93-1901-12; 93-1901-13; 93-1901-14; 93-2201-5; and 93-2501-3.

2. The foregoing superseded sections were superseded upon the adoption of the Montana Rules of Evidence by order of this Court dated December 29, 1976, and were thereby rendered obsolete, unecessary [sic] and redundant; the continued presence of said sections as a part of the law of Montana tends to lead to confusion, uncertainty and conflict in the law, all of which are contrary to the spirit and purpose of the Montana Rules of Evidence and the ends of justice."

Rule 101. Scope.

(a) Proceedings generally. These rules govern all proceedings in all courts in the state of Montana with the exceptions stated in this rule.

(b) Rules of privilege. The rules with respect to privileges found in Article V apply at all stages of all actions, cases and proceedings.

(c) Rules inapplicable. The rules (other than those with respect to privileges) do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104(a).

(2) Grand jury. Proceedings before grand juries.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations and proceedings on applications for leave to file informations in criminal cases; sentencing; dispositional hearings in youth court proceedings; granting or revoking probation or parole; issuance of warrants for arrest, criminal summonses and notices to appear, and search warrants; and proceedings with respect to release on bail or otherwise.

(4) Summary proceedings. Proceedings, other than motions for summary judgment, where the court is authorized by law to act summarily.

(5) Other miscellaneous proceedings. Ex parte matters; and proceedings, when authorized by law, which are uncontested or nonadversary.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 102. Purpose and construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 103. Rulings on evidence.

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is ffected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objecion or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of proof. In case the ruling is one excluding evidence, the subtance of the evidence was made known to the court by offer or was apparent rom the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further tatement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of the jury. In jury cases, proceedings shall be conducted, to he extent practicable, so as to prevent inadmissible evidence from being sugested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain error. Nothing in this rule precludes taking notice of plain rrors affecting substantial rights although they were not brought to the ttention of the court.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 104. Preliminary questions of admissibility.

(a) Questions of admissibility generally. Preliminary questions concerning he qualification of a person to be a witness, the existence of a privilege, or he admissibility of evidence shall be determined by the court. In making its etermination it is not bound by the rules of evidence except those with espect to privileges.

(b) Admissibility subject to a condition. Except as otherwise provided by aw, when the admissibility of evidence depends upon proof of other connectng facts, the court may admit such evidence subject to the condition that urther evidence be introduced sufficient to support a finding of those conecting facts. The order of proof may be regulated by the sound discretion f the court.

(c) Hearing of jury. Hearings on the admissibility of confessions shall in ll cases be conducted out of the hearing of the jury. Hearings on other preminary matters shall be so conducted when the interests of justice require r, when an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a reliminary matter, subject himself to cross-examination as to other issues in he case.

(e) Weight and credibility. This rule does not limit the right of a party o introduce before the jury evidence relevant to weight or credibility.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 105. Limited admissibility.

When evidence which is admissible as to one party or for one purpose but ot admissible as to another party or for another purpose is admitted, the ourt, upon request, shall restrict the evidence to its proper scope and nstruct the jury accordingly.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 106. Remainder of or related acts, writings, or statements.

(a) When part of an act, declaration, conversation, writing or recorded statement or series thereof is introduced by a party:

(1) an adverse party may require him at that time to introduce any other part of such item or series thereof which ought in fairness to be considered at that time; or

(2) an adverse party may inquire into or introduce any other part of such item of evidence or series thereof.

(b) This rule does not limit the right of any party to cross-examine or further develop as part of his case matters covered by this rule.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Article II

Judicial Notice

Rule 201. Judicial notice of facts.

(a) Scope of rule. This rule governs judicial notice of all facts.

(b) Kinds of facts. A fact to be judicially noticed must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

(c) When discretionary. A court may take judicial notice, whether requested or not.

(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.

(g) Instructing the jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 202. Judicial notice of law.

(a) Scope of rule. This rule governs judicial notice of law.

(b) Kinds of law. Law includes but is not limited to the following:

(1) The common law, constitutions and statutes of the United States and of this and every other state, territory and jurisdiction of the United States;

(2) Duly enacted ordinances and regulations of governmental divisions of this state, including their charters;

(3) Regulations and legislative enactments issued by or under authority of the United States and of this and any state of the United States by or for their agencies or administrations;

(4) Official acts of the legislative, executive, and judicial departments of the United States and of this and any state of the United States;

(5) Private acts and resolutions of the Congress of the United States and of the legislature of this state;

(6) Records of any court of this state or of any court of record of the United States or any court of record of any state of the United States;

(7) Rules of practice and procedure of any court of this state or of any court of record of the United States or any court of record of any state of the United States;

(8) The law of foreign nations;

(9) International law;

(10) Maritime law;

(11) The seals of office of the officers of government in the legislative, executive, and judicial departments of government of the United States and of this and every other state, territory and jurisdiction of the United States, of any foreign jurisdiction recognized by the executive power of the United States, and of notaries public.

(c) When discretionary. A court may take judicial notice of the law listed in parts 2-10 of Rule 202(b) or other law, whether requested or not. The court may inform itself of any law in such manner as it may deem proper and the court may call upon counsel to aid it in obtaining such information.

(d) When mandatory. A court shall take judicial notice:

(1) of the common law, constitutions and statutes of the United States and of this and every other state, territory and jurisdiction of the United States; and

(2) of any other law when requested by a party and supplied with the necessary information.

(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the law noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of taking notice.

(1) Judicial notice of the laws of this state and of the United States may be taken at any stage of the proceedings.

(2) Any party may present to the judge or court any admissible evidence of law. To enable a party to offer evidence of the law other than of this state and of the United States or to ask that judicial notice be taken thereof, reasonable notice shall be given to the adverse party either in the pleadings or otherwise.

(g) Question for the court. Except as otherwise provided by law, the determination of law shall be made by the court.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Article III

Presumptions

Rule 301. Presumptions in general.

(a) Presumption defined. A presumption is an assumption of fact that the law requires to be made from another fact or group of facts found or otherwise established in the action or proceeding.

(b) Classification and effect of presumptions.

(1) Conslusive presumptions are presumptions that are specifically declared conclusive by statute. Conclusive presumptions may not be controverted.

(2) All presumptions, other than conclusive presumptions, are disputable presumptions and may be controverted. A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.

(c) Inconsistent presumptions. If presumptions are inconsistent the court shall apply the presumption that is founded upon weightier considerations of public policy. If considerations of public policy are of equal weight the court shall disregard both presumptions.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 302. Applicability of federal law in civil cases.

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Article IV

Relevancy and Its Limits

Rule 401. Definition of relevant evidence.

Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Relevant evidence may include evidence bearing upon the credibility of a witness or hearsay declarant.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible.

All relevant evidence is admissible, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 404. Character evidence not admissible to prove conduct, exceptions; other crimes; character in issue.

(a) Character evidence generally. Evidence of a person's character or a rait of his character is not admissible for the purpose of proving that he cted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character ffered by an accused, or by the prosecution to rebut the same.

(2) Character of victim. Evidence of a pertinent trait of character of the ictim of the crime offered by an accused, or by the prosecution to rebut the ame, or evidence of a character trait of peacefulness of the victim offered y the prosecution in a homicide case or in an assault case where the victim incapable of testifying to rebut evidence that the victim was the first ggressor.

(3) Character of witness. Evidence of the character of a witness, as pro-ided in Article VI.

(b) Other crimes, wrongs, acts. Evidence of other crimes, wrongs, or acts not admissible to prove the character of a person in order to show that e acted in conformity therewith. It may, however, be admissible for other urposes, such as proof of motive, opportunity, intent, preparation, plan, nowledge, identity, or absence of mistake or accident.

(c) Character in issue. Evidence of a person's character or a trait of his aracter is admissible in cases in which character or a trait of character of person is an essential element of a charge, claim, or defense.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 405. Methods of proving character.

(a) Reputation or opinion. In all cases in which evidence of character or trait of character of a person is admissible, proof may be made by testi-ony as to reputation or by testimony in the form of an opinion. On cross-amination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of aracter of a person is an essential element of a charge, claim, or defense, where the character of the victim relates to the reasonableness of force sed by the accused in self defense, proof may also be made of specific stances of his conduct.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 406. Habit; routine practice.

(a) Habit and routine practice defined. A habit is a person's regular sponse to a repeated specific situation. A routine practice is a regular urse of conduct of a group of persons or an organization.

(b) Admissibility. Evidence of habit or of routine practice, whether cor-borated or not, and regardless of the presence of eyewitnesses, is relevant prove that conduct on a particular occasion was in conformity with the abit or routine practice.

(c) Method of proof. Habit or routine practice may be proved by testi-ony in the form of an opinion or by specific instances of conduct sufficient number to warrant a finding that the habit existed or that the practice as routine.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 407. Subsequent remedial measures.

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 408. Compromise and offers to compromise.

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 409. Payment of expenses.

Evidence of payment of expenses occasioned by an injury or occurrence is not admissible to prove liability.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 410. Offer to plead guilty; nolo contendere; withdrawn plea of guilty.

Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer. This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Article V

Privileges

Rule 501. Privileges recognized only as provided.

Except as otherwise provided by constitution, statute, these rules, or other les applicable in the courts of this state, no person has a privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object or writing; or

(4) prevent another from being a witness or disclosing any matter or pro- cing any object or writing.

istory: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 502. Identity of informer.

(a) Rule of privilege. The United States or a state or subdivision thereof s a privilege to refuse to disclose the identity of a person who has fur- hed information relating to or assisting in an investigation of a possible lation of a law.

b) Who may claim the privilege. The privilege may be claimed by an propriate representative of the public entity to which the information was nished.

c) Exceptions and limitations.

1) Voluntary disclosure; informer a witness. No privilege exists under s rule if the identity of the informer or his interest in the subject matter his communication has been disclosed to those who would have cause to ent the communication by a holder of the privilege or by the informer's n action, or if the informer appears as a witness for the public entity.

2) Testimony on relevant issue. If it appears in the case that an informer y be able to give testimony relevant to any issue in a criminal case or to air determination of a material issue on the merits in a civil case to which ublic entity is a party, and the public entity invokes the privilege, the rt shall give the public entity an opportunity to show facts relevant to ermining whether the informer can, in fact, supply that testimony.

f the Court finds that the informer should be required to give the testi- ny, and the public entity elects not to disclose his identity, the court on tion of the defendant in a criminal case shall dismiss the charges to which testimony would relate, and the court may do so on its own motion. In il cases, the court may make any order that justice requires.

istory: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

ule 503. Waiver of privilege by voluntary disclosure.

a) General rule. A person upon whom these rules confer a privilege inst disclosure waives the privilege if he or his predecessor while the der of the privilege voluntarily discloses or consents to disclosure of any nificant part of the privileged matter. This rule does not apply if the dis- sure itself is privileged.

b) Joint holders. Where two or more persons are joint holders of a privi- e, a waiver of the right of a particular joint holder to claim the privilege s not affect the right of another joint holder to claim the privilege.

istory: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 504. Privileged matter disclosed under compulsion o without opportunity to claim the privilege.

A claim of privilege is not defeated by a disclosure which was (a) compelled erroneously or (b) made without opportunity to claim the privilege.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 505. Comment upon or inference from claim of privilege.

The claim of a privilege, whether in the present proceeding or upon a prio occasion, is not a proper subject of comment by the court or counsel. N inference may be drawn therefrom.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Article VI

Witnesses

Rule 601. Competency in general; disqualification.

(a) General rule competency. Every person is competent to be a witnes except as otherwise provided in these rules.

(b) Disqualification of witnesses. A person is disqualified to be a witnes if the court finds that (1) the witness is incapable of expressing himself concerning the matter so as to be understood by the judge and jury eithe directly or through interpretation by one who can understand him or (2) th witness is incapable of understanding the duty of a witness to tell the truth.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 602. Lack of personal knowledge.

A witness may not testify as to a matter unless evidence is introduced su ficient to support a finding that he has personal knowledge of the matte Evidence to prove personal knowledge may, but need not, consist of the test mony of the witness himself. This rule is subject to the provisions of Rul 703, relating to opinion testimony by expert witnesses.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 603. Oath or affirmation.

Before testifying, every witness shall be required to declare that he wi testify truthfully, by oath or affirmation administered in a form calculate to awaken his conscience and impress his mind with his duty to do so.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 604. Interpreters.

An interpreter is subject to the provisions of these rules relating to qualif cation as an expert and the administration of an oath or affirmation that h will make a true translation.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 605. Competency of judge as witness.

The judge presiding at the trial may not testify in that trial as a witnes No objection need be made in order to preserve the point.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 606. Competency of juror as witness.

(a) At the trial. A member of the jury may not be called or testify as a tness before that jury in the trial of the case in which he is sitting as a or. If he is called to testify, the opposing party shall be afforded an oppor- nity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into e validity of a verdict or indictment, a juror may not testify as to any mat- or statement occurring during the course of the jury's deliberations or to e effect of anything upon his or any other juror's mind or emotions as luencing him to assent or dissent from the verdict or indictment or con- ning his mental processes in connection therewith. Nor may his affidavit evidence of any statement by him concerning a matter about which he uld be precluded from testifying be received for these purposes.

However, as an exception to this subdivision, a juror may testify and an idavit or evidence of any kind be received as to any matter or statement ncerning only the following questions, whether occurring during the course the jury's deliberations or not: (1) whether extraneous prejudicial informa- n was improperly brought to the jury's attention; or (2) whether any out- e influence was brought to bear upon any juror; or (3) whether any juror s been induced to assent to any general or special verdict, or finding on y question submitted to them by the court, by a resort to the determina- n of chance.

istory: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 607. Who may impeach; party not bound by testimony.

a) The credibility of a witness may be attacked by any party, including party calling him.

b) No party is bound by the testimony of any witness.

istory: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 608. Evidence of character and conduct of witness.

a) Opinion and reputation evidence of character. The credibility of a ness may be attacked or supported by evidence in the form of opinion or utation, but subject to these limitations: (1) the evidence may refer only character for truthfulness or untruthfulness, and (2) evidence of truthful racter is admissible only after the character of the witness for truthfulness s been attacked by opinion or reputation evidence or otherwise.

b) Specific instances of conduct. Specific instances of the conduct of a ness, for the purpose of attacking or supporting his credibility, may not proved by extrinsic evidence. They may, however, in the discretion of the urt, if probative of truthfulness or untruthfulness, be inquired into on ss-examination of the witness (1) concerning his character for truthfulness untruthfulness, or (2) concerning the character for truthfulness or ruthfulness of another witness as to which character the witness being ss-examined has testified.

The giving of testimony, whether by an accused or by any other witness, es not operate as a waiver of his privilege against self-incrimination when amined with respect to matters which relate only to credibility.

istory: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 609. Impeachment by evidence of conviction of crime.

For the purpose of attacking the credibility of a witness, evidence that h has been convicted of a crime is not admissible.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 610. Religious beliefs or opinions.

Evidence of the beliefs or opinions of a witness on matters of religion i not admissible for the purpose of showing that by their nature his credibilit is impaired or enhanced.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 611. Mode and order of interrogation and presentation re-examination and recall; confrontation.

(a) Control by court. The court shall exercise reasonable control over th mode and order of interrogating witnesses and presenting evidence so as t (1) make the interrogation and presentation effective for the ascertainmen of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination.

(1) Cross-examination should be limited to the subject matter of th direct examination and matters affecting the credibility of the witness. Th court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(2) Evidence developed on cross-examination may be considered by th trier of fact as proof of any fact in issue in the case.

(c) Leading questions. Leading questions should not be used on the direc examination of a witness except as may be necessary to develop his testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witnes identified with an adverse party, interrogation may be by leading questions.

(d) Re-examination and recall. A witness may be re-examined as to th same matters to which he testified only in the discretion of the court, bu without exception he may be re-examined as to any new matter brought ou during cross-examination. After the examination of the witness has been concluded by all the parties to the action, that witness may be recalled only i the discretion of the court. This rule shall not limit the right of any part to recall a witness in rebuttal.

(e) Confrontation. Except as otherwise provided by constitution, statut these rules, or other rules applicable to the courts of this state, at the tri of an action, a witness can be heard only in the presence and subject to th examination of all the parties to the action, if they choose to attend an examine.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 612. Writings used to refresh memory.

If a witness uses a writing to refresh his memory for the purpose of test fying, either

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is nece sary in the interests of justice, an adverse party is entitled to have the wri ing produced at the hearing, to inspect it, to cross-examine the witnes

hereon, and to introduce into evidence those portions which relate to the estimony of the witness. If it is claimed that the writing contains matters ot related to the subject matter of the testimony the court shall examine he writing in camera, excise any portions not so related, and order delivery f the remainder to the party entitled thereto. Any portion withheld over bjection shall be preserved and made available to the appellate court in the vent of an appeal. If a writing is not produced or delivered pursuant to rder under this rule, the court shall make any order justice requires, except hat in criminal cases when the prosecution elects not to comply, the order hall be one striking the testimony or, if the court in its discretion deter- ines that the interests of justice so require, declaring a mistrial.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 613. Prior statements of witnesses.

(a) Examining witness concerning prior statement. In examining a witness oncerning a prior statement made by him, whether written or not, the state- ent need not be shown nor its contents disclosed to him at that time, but n request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic evidence of prior inconsistent statement of witness. Extrin- c evidence of a prior inconsistent statement by a witness is not admissible nless the witness is afforded an opportunity to explain or deny the same nd the opposite party is afforded an opportunity to interrogate him thereon, r the interests of justice otherwise require. This provision does not apply to dmissions of a party-opponent as defined in Rule 801(d)(2).

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 614. Calling and interrogation of witnesses by court.

(a) Calling by court. The court may, on its own motion or at the sugges- on of a party, call witnesses and all parties are entitled to cross-examine itnesses thus called.

(b) Interrogation by court. The court may interrogate witnesses, whether lled by itself or a party; provided, however, that in trials before a jury, the urt's questioning must be cautiously guarded so as not to constitute press or implied comment.

(c) Objections. Objections to the calling of a witness by the court or to e interrogation by it may be made at the time or at the next available portunity when the jury is not present.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 615. Exclusion of witnesses.

At the request of a party, the court shall order witnesses excluded so that ey cannot hear the testimony of other witnesses, and it may make the der of its own motion. This rule does not authorize exclusion of (1) a party ho is a natural person, or (2) an officer or employee of a party which is not natural person designated as its representative by its attorney, or (3) a rson whose presence is shown by a party to be essential to the presentation his cause.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Article VII

Opinions and Expert Testimony

Rule 701. Opinion testimony by lay witnesses.

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 702. Testimony by experts.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 703. Basis of opinion testimony by experts.

The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in a particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 704. Opinions on ultimate issue.

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 705. Disclosure of facts or data underlying expert opinion.

The expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Article VIII

Hearsay

Rule 801. Definitions.

The following definitions apply under this article:

(a) Statement. A statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) Declarant. A declarant is a person who makes a statement.

(c) Hearsay. Hearsay is a statement, other than one made by the declarnt while testifying at the trial or hearing, offered in evidence to prove the uth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if:

(1) Prior statement by witness. The declarant testifies at the trial or earing and is subject to cross-examination concerning the statement, and e statement is (A) inconsistent with his testimony, or (B) consistent with is testimony and is offered to rebut an express or implied charge against im of subsequent fabrication, improper influence or motive, or (C) one of lentification of a person made after perceiving him; or

(2) Admission by party-opponent. The statement is offered against a arty and is (A) his own statement, in either his individual or a representave capacity, or (B) a statement of which he has manifested his adoption or elief in its truth, or (C) a statement by a person authorized by him to make statement concerning the subject, or (D) a statement by his agent or rvant concerning a matter within the scope of his agency or employment, ade during the existence of that relationship, or (E) a statement by a conspirator of a party during the course and in furtherance of the conspiry.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 802. Hearsay rule.

Hearsay is not admissible except as otherwise provided by statute, these les, or other rules applicable in the courts of this state.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 803. Hearsay exceptions: availability of declarant nmaterial.

The following are not excluded by the hearsay rule, even though the clarant is available as a witness:

(1) Present sense impression. A statement describing or explaining an ent or condition made while the declarant was perceiving the event or contion, or immediately thereafter.

(2) Excited utterance. A statement relating to a startling event or condin made while the declarant was under the stress of excitement caused by e event or condition.

(3) Then-existing mental, emotional, or physical condition. A statement of e declarant's then-existing state of mind, emotion, sensation, or physical ndition (such as intent, plan, motive, design, mental feeling, pain and bod health), but not including a statement of memory or belief to prove the ct remembered or believed.

(4) Statements for purposes of medical diagnosis or treatment. Stateents made for purposes of medical diagnosis or treatment and describing edical history, or past or present symptoms, pain, or sensations, or the ception or general character of the cause or external source thereof insofar reasonably pertinent to diagnosis or treatment.

(5) Recorded recollection. A memorandum or record concerning a matter out which a witness once had knowledge but now has insufficient collection to enable him to testify fully and accurately, shown to have been ade or adopted by the witness when the matter was fresh in his memory

and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) Records of regularly conducted activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnosis, made at or near the time of the acts, events, conditions, opinions, or diagnosis, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) Public records and reports. To the extent not otherwise provided in this paragraph, records, reports, statements, or data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule: (i) investigative reports by police and other law enforcement personnel; (ii) investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; (iii) factual findings offered by the government in criminal cases; (iv) factual findings resulting from special investigation of a particular complaint, case, or incident; and (v) any matter as to which the sources of information or other circumstances indicate lack of trustworthiness.

(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) Absence of public record or entry. To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement or data compilation, or entry.

(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Marriage, baptismal, and similar certificates. Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) Statements in ancient documents. Statements in a document in existence twenty years or more, the authenticity of which is established.

(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by him in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) Reputation concerning personal or family history. Reputation among members of his family by blood, adoption, or marriage, or among his associates, or in the community, concerning a person's birth, adoption, marriage, divorce or dissolution of marriage, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of his personal or family history.

(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the commmunity, and reputation as to events of general history important to the community or state or nation in which located.

(21) Reputation as to character. Reputation of a person's character among his associates or in the community.

(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal

prosecution, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) Judgment as to personal, family, or general history, or boundaries. Judgments as proof of matters of personal, family or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 804. Hearsay exceptions: declarant unavailable.

(a) Definition of unavailability. Unavailability as a witness includes situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or

(3) testifies to a lack of memory of the subject matter of his statement; or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, (A) in civil actions and proceedings, at the instance of or against a party with an opportunity to develop the testimony by direct, cross, or redirect examination, with motive and interest similar to those of the party against whom now offered; and (B) in criminal actions and proceedings, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross, and redirect examination.

(2) Statement under belief of impending death. A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstance of what he believed to be his impending death.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the

accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce or dissolution of marriage, legitimacy, relationship by blood, or family history, even though the declarant had no means of acquiring the personal knowledge of the matter stated; or

(B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having comparable circumstantial guarantees of trustworthiness.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 805. Hearsay within hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of a combined statement conforms with an exception to the hearsay rule provided in these rules.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 806. Attacking and supporting the credibility of declarant.

When a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Article IX

Authentication and Identification

Rule 901. Requirement of authentication or identification.

(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by trier or expert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) Ancient documents or data compilation. Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Method provided by statute or rule. Any method of authentication or identification provided by statute, these rules, or other rules applicable in the courts of this state.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic public documents not under seal. Except as otherwise provided by statute, a document purporting to bear the signature in his official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official

uties in the district or political subdivision of the officer or employee certi-
ies under seal that the signer has the official capacity and that the signature
genuine.

(3) Foreign public documents. A document purporting to be executed or
ttested in his official capacity by a person authorized by the laws of a for-
ign country to make the execution or attestation, and accompanied by a
nal certification as to the genuineness of the signature and official position
A) of the executing or attesting person, or (B) of any foreign official whose
ertificate of genuineness of signature and official position relates to the
xecution of attestation or is in a chain of certificates of genuineness of sig-
ature and official position relating to the execution or attestation. A final
ertification may be made by a secretary of embassy or legation, consul gen-
ral, consul, vice consul, or consular agent of the United States, or a diplo-
atic or consular official of the foreign country assigned or accredited to the
nited States. If a reasonable opportunity has been given to all parties to
vestigate the authenticity and accuracy of official documents, the court
ay, for good cause shown, order that they be treated as presumptively
uthentic without final certification or permit them to be evidenced by an
ttested summary with or without final certification.

(4) Certified copies of public records. A copy of an official record or
port or entry therein, or of a document authorized by law to be recorded
r filed and actually recorded or filed in a public office, including data com-
ilations in any form, certified as correct by the custodian or other person
uthorized to make the certification, by certificate complying with paragraph
), (2), or (3) or complying with any law of the United States or of this
ate.

(5) Official publications. Books, pamphlets, or other publications purport-
g to be issued by public authority.

(6) Newspapers and periodicals. Printed materials purporting to be news-
apers or periodicals.

(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels pur-
orting to have been affixed in the course of business and indicating owner-
ip, control, or origin.

(8) Acknowledged docuents. Documents accompanied by a certificate of
knowledgement executed in the manner provided by law by a notary public
other officer authorized by law to take acknowledgements.

(9) Commercial paper and related documents. Commercial paper,
gnatures thereon, and documents relating thereto to the extent provided by
neral commercial law.

(10) Presumptions created by law. Any signature, document, or other mat-
r declared by any law of the United States or of this state to be presump-
vely or prima facie genuine or authentic.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 903. Subscribing witness' testimony unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a
riting unless required by the laws of the jurisdiction whose laws govern the
lidity of the writing.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Article X

Contents of Writings, Recordings, and Photographs

Rule 1001. Definitions.

For purposes of this article the following definitions are applicable:

(1) Writings and recordings. Writings and recordings consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. Photographs include still photographs, x-ray films, video tapes, and motion pictures.

(3) Original. An original of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An original of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an original.

(4) Duplicate. A duplicate is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

(5) Copies of entries in the regular course of business. A copy of an entry in the regular course of business consists of an entry in a writing kept in the regular course of business copied from another such writing by manual or mechanical means at or near the time of the transaction.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 1002. Requirement of original.

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided by statute, these rules, or other rules applicable in the courts of this state.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 1003. Admissibility of duplicates, copies of certain entries.

A duplicate, or copy of an entry in the regular course of business as defined in Rule 1001(5), is admissible to the same extent as an original unless:

(1) a genuine question is raised as to the authenticity of the original; or

(2) in the circumstances it would be unfair to admit the duplicate or copy of an entry in the regular course of business in lieu of the original; or

(3) otherwise provided by statute.

History: **Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.**

Rule 1004. Admissibility of other evidence of contents.

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if:

(1) Originals lost or destroyed. All originals are lost or have been estroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original not obtainable. No original can be obtained by any available udicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was nder the control of the party against whom offered, he was put on notice, y the pleadings or otherwise, that the contents would be a subject of proof the hearing, and he does not produce the original at the hearing; or

(4) Collateral matters. The writing, recording, or photograph is not closely lated to a controlling issue.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 1005. Public records.

The contents of an official record, or of a document authorized to be corded or filed and actually recorded or filed, including data compilations any form, if otherwise admissible, may be proved by copy, certified as cor- ct in accordance with Rule 902 or testified to be correct by a witness who as compared it with the original. If a copy which complies with the forego- g cannot be otained by the exercise of reasonable diligence, then other evi- ence of the contents may be given.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 1006. Summaries.

The contents of voluminous writings, recordings, or photographs which nnot conveniently be examined in court may be presented in the form of chart, summary, or calculation. The originals, or duplicates, shall be made ailable for examination or copying, or both, by other parties at a reason- le time and place. The court may order that they be produced in court.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 1007. Testimony or written admission of party.

Contents of writings, recordings, or photographs may be proved by the stimony or deposition of the party against whom offered or by his written lmission, without accounting for the nonproduction of the original.

History: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

Rule 1008. Functions of court and jury.

When the admissibility of other evidence of contents of writings, record- gs, or photographs under these rules depends upon the fulfillment of a con- tion of fact, the question whether the condition has been fulfilled is for the urt to determine in accordance with the provisions of Rule 104.

istory: Ad. Sup. Ct. Ord. 12729, Dec. 29, 1976, eff. July 1, 1977.

TITLE 27

REMEDIES

Ch.
1. Availability of Remedies — Liability.
2. Statutes of Limitations.
   Chapters 3 and 4 reserved.
5. Arbitration.
6. Montana Medical Malpractice Panel Act.
7. Submission of Controversy Without Action.
8. Uniform Declaratory Judgments Act.
9. Confession of Judgment.
   Chapters 10 through 14 reserved.
15. Provisional Remedies.
16. Arrest and Bail in Civil Actions.
17. Claim and Delivery of Personal Property.
18. Prejudgment Attachment.
19. Injunctions.
20. Receivers.
   Chapters 21 through 24 reserved.
25. Certiorari — Writ of Review.
26. Mandamus — Writ of Mandate.
27. Writ of Prohibition.
28. Quo Warranto.
   Chapter 29 reserved.
30. Nuisances.
31. Change of Name.
32. Judicial Determination of Birth Date.

CHAPTER 1

AVAILABILITY OF REMEDIES — LIABILITY

Part 1 — General Provisions

ection
7-1-101. Judicial remedies defined.
7-1-102. Actions and special proceedings defined.
7-1-103. Civil and criminal actions.
7-1-104. Bases for civil actions.
7-1-105. Obligation defined.
7-1-106. Injury defined.
7-1-107. Kinds of relief — when given.

Part 2 — Damages

-1-201. Detriment defined.
-1-202. Right to compensatory damages.
-1-203. Right to damages for detriment resulting after suit brought and for future detriment.
-1-204. Nominal damages when no appreciable detriment.
Sections 27-1-205 through 27-1-210 reserved.
-1-211. Right to interest.
-1-212. When award of interest discretionary.
-1-213. Validity of interest rate set by contract.
-1-214. Waiver of interest by accepting principal.
Sections 27-1-215 through 27-1-220 reserved.

27-1-221. When exemplary damages allowed.
27-1-222. Exemplary damages for inhumane injuries to animals.
27-1-223. Damages for injuries or death inflicted in a duel.

Part 3 — Measure of Damages

27-1-301. Prescribed damages exclusive of exemplary damages and interest.
27-1-302. Damages to be reasonable.
27-1-303. Limitation of damages for breach of obligation.
27-1-304. Value of written instrument.
27-1-305. Property of peculiar value.
Sections 27-1-306 through 27-1-310 reserved.
27-1-311. Breach of contract.
27-1-312. Breach of obligation to pay money.
27-1-313. Breach of warranty of agent's authority.
27-1-314. Breach of agreement to convey real property.
27-1-315. Breach of agreement to buy real property.
27-1-316. Breach of convenants in grants of estates in real property.
27-1-317. Breach of obligation other than contract.
27-1-318. Wrongful occupation of real property.
27-1-319. Willful holding over of real property.
27-1-320. Conversion of personal property.
27-1-321. Conversion of personal property — damages of lienholder.
27-1-322. Seduction.
27-1-323. Wrongful death.

Part 4 — Specific and Preventive Relief

27-1-401. When specific or preventive relief permitted.
27-1-402. How specific relief given.
27-1-403. How preventive relief given.
Sections 27-1-404 through 27-1-410 reserved.
27-1-411. When specific performance of an obligation may be compelled.
27-1-412. Obligations which cannot be specifically enforced.
27-1-413. Specific performance not to be oppressive.
27-1-414. Right to specific performance to be mutual.
27-1-415. Parties who cannot be compelled to perform.
27-1-416. Parties who cannot obtain specific performance.
27-1-417. Specific performance by party who signed when other party did not sign contract.
27-1-418. Liquidation of damages not a bar to specific performance.
27-1-419. Specific performance of agreement to transfer property — distinction between real and personal property.
27-1-420. No specific performance of agreement to buy property when title not clear.
27-1-421. Compelling performance of successor in interest in title — obligations respecting real property.
Sections 27-1-422 through 27-1-430 reserved.
27-1-431. Judgment for possession of or title to real property.
27-1-432. Judgment for delivery of personal property.
27-1-433. Cancellation of written instrument.

Part 5 — Right to Bring Action or Assert Defense

27-1-501. Survival of cause of action or defense — death or disability or transfer of interest.
27-1-502. Survival of counterclaim — death or assignment.
27-1-503. What defenses to action survive assignment of right to action.
Sections 27-1-504 through 27-1-510 reserved.
27-1-511. Right of minor to bring civil action or other proceeding.
27-1-512. Action by parent or guardian for injury to or death of child or ward.
27-1-513. Action for wrongful death of adult.
27-1-514. Who may sue for whose seduction.
27-1-515. Protection of personal relations — abduction.
27-1-516. Injury to servant.

Part 6 — Abolition of Certain Causes of Action

7-1-601. Cause of action for alienation of affections abolished.
7-1-602. Cause of action for breach of promise abolished — right to damages for fraud and unjust enrichment preserved.
7-1-603. Acts within Montana not to give rise to abolished cause of action.
7-1-604. Litigation and threat of litigation prohibited.
7-1-605. Agreements settling or compromising abolished causes of action.
7-1-606. Criminal penalty.

Part 7 — Liability

7-1-701. Liability for negligence as well as willful acts.
7-1-702. Comparative negligence — extent to which contributory negligence bars recovery in action for damages.
7-1-703. Multiple defendants jointly and severally liable — right of contribution.
Sections 27-1-704 through 27-1-710 reserved.
7-1-711. Liability of minor or person of unsound mind for own torts — exemplary damages.
7-1-712. Liability for damages for deceit.
7-1-713. Duty to restore thing wrongfully acquired or retained.
7-1-714. Limits on liability for emergency care rendered at scene of accident or emergency.
7-1-715. Liability of owner of vicious dog.

Part 8 — Libel and Slander

7-1-801. Defamation — how effected.
7-1-802. Libel defined.
7-1-803. Slander defined.
7-1-804. What communications are privileged.
Sections 27-1-805 through 27-1-810 reserved.
7-1-811. When owner of radio station not liable for material broadcast.
7-1-812. Right of owner to require prior submission of text to be broadcast.
7-1-813. Liability of person broadcasting — liability of owner for broadcast prepared by station.
7-1-814 through 27-1-817. Repealed. Sec. 62, Ch. 12, L. 1979.
7-1-818. Media management to be given opportunity to publish correction prior to action for libel or slander.
7-1-819. What constitutes a reasonable time for correction.
7-1-820. Content of correction.
7-1-821. Extent to which a correction is a defense upon trial.

Part 1

General Provisions

27-1-101. Judicial remedies defined. Judicial remedies are such as e administered by the courts of justice or by judicial officers empowered r the purpose by the constitution and statutes of this state.

History: En. Sec. 3469, C. Civ. Proc. 1895; re-en. Sec. 8077, Rev. C. 1907; re-en. Sec. 8995, C.M. 1921; Cal. C. Civ. Proc. Sec. 20; re-en. Sec. 8995, R.C.M. 1935; R.C.M. 1947, 93-2201.

27-1-102. Actions and special proceedings defined. (1) These medies are divided into two classes:

(a) actions; and

(b) special proceedings.

(2) An action is an ordinary proceeding in a court of justice by which one arty prosecutes another for the enforcement or protection of a right, the

redress or prevention of a wrong, or the punishment of a public offense. Every other remedy is a special proceeding.

History: (1)En. Sec. 3470, C. Civ. Proc. 1895; re-en. Sec. 8078, Rev. C. 1907; re-en. Sec. 8996, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 21; re-en. Sec. 8996, R.C.M. 1935; Sec. 93-2202, R.C.M. 1947; (2)Ap. p. Sec. 3471, C. Civ. Proc. 1895; re-en. Sec. 8079, Rev. C. 1907; re-en. Sec. 8997, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 22; re-en. Sec. 8997, R.C.M. 1935; Sec. 93-2203, R.C.M. 1947; Ap. p. Sec. 3472, C. Civ. Proc. 1895; re-en. Sec. 8080, Rev. C. 1907; re-en. Sec. 8998, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 23; re-en. Sec. 8998, R.C.M. 1935; Sec. 92-2204, R.C.M. 1947; R.C.M. 1947, 92-2202, 93-2203, 93-2204.

27-1-103. Civil and criminal actions. (1) Actions are of two kinds:

(a) civil; and

(b) criminal.

(2) A civil action is prosecuted by one party against another for the enforcement or protection of a right or the redress or prevention of a wrong. Titles 45 and 46 define and provide for the prosecution of a criminal action. When the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

History: (1)En. Sec. 3473, C. Civ. Proc. 1895; re-en. Sec. 8081, Rev. C. 1907; re-en. Sec. 8999, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 24; re-en. Sec. 8999, R.C.M. 1935; Sec. 92-2205, R.C.M. 1947; (2)Ap. p. Sec. 3479, C. Civ. Proc. 1895; re-en. Sec. 8087, Rev. C. 1907; re-en. Sec. 9005, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 30; re-en. Sec. 9005, R.C.M. 1935; Sec. 93-2211, R.C.M. 1947; Ap. p. Sec. 3480, C. Civ. Proc. 1895; re-en. Sec. 8088, Rev. C. 1907; re-en. Sec. 9006, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 31; re-en. Sec. 9006, R.C.M. 1935; Sec. 93-2212, R.C.M. 1947, 93-2212; Ap. p. Sec. 3481, C. Civ. Proc. 1895; re-en. Sec. 8089, Rev. C. 1907; re-en. Sec. 9007, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 32; re-en. Sec. 9007, R.C.M. 1935; Sec. 93-2213, R.C.M. 1947; R.C.M. 1947, 93-2205, 93-2211, 93-2212, 93-2213.

27-1-104. Bases for civil actions. A civil action arises out of:

(1) an obligation;

(2) an injury.

History: En. Sec. 3474, C. Civ. Proc. 1895; re-en. Sec. 8082, Rev. C. 1907; re-en. Sec. 9000, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 25; re-en. Sec. 9000, R.C.M. 1935; R.C.M. 1947, 93-2206.

27-1-105. Obligation defined. An obligation is a legal duty by which one person is bound to do or not to do a certain thing and arises from:

(1) contract; or

(2) operation of law.

History: En. Sec. 3475, C. Civ. Proc. 1895; re-en. Sec. 8083, Rev. C. 1907; re-en. Sec. 9001, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 26; re-en. Sec. 9001, R.C.M. 1935; R.C.M. 1947, 93-2207.

27-1-106. Injury defined. (1) An injury is of two kinds:

(a) to the person; and

(b) to property.

(2) An injury to property consists in depriving its owner of the benefit of it, which is done by taking, withholding, deteriorating, or destroying it. Every other injury is an injury to the person.

History: (1)En. Sec. 3476, C. Civ. Proc. 1895; re-en. Sec. 8084, Rev. C. 1907; re-en. Sec. 9002, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 27; re-en. Sec. 9002, R.C.M. 1935; Sec. 93-2208, R.C.M. 1947; (2)Ap. p. Sec. 3477, C. Civ. Proc. 1895; re-en. Sec. 8085, Rev. C. 1907; re-en. Sec. 9003, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 28; re-en. Sec. 9003, R.C.M. 1935; Sec. 93-2209, R.C.M. 1947; Ap. p. Sec. 3478, C. Civ. Proc. 1895; re-en. Sec. 8086, Rev. C. 1907; re-en. Sec. 9004, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 29; re-en. Sec. 9004, R.C.M. 1935; Sec. 93-2210, R.C.M. 1947; R.C.M. 1947, 93-2208, 93-2209, 93-2210.

27-1-107. Kinds of relief — when given. As a general rule, compensation is the relief or remedy provided by the law of this state for the violation of private rights and the means of securing their observance. Specific and preventive relief may be given only in those cases specified by statute.

History: En. Sec. 4260, Civ. C. 1895; re-en. Sec. 6038, Rev. C. 1907; re-en. Sec. 8657, R.C.M. 1921; Cal. Civ. C. Sec. 3274; re-en. Sec. 8657, R.C.M. 1935; R.C.M. 1947, 17-101; amd. Sec. 1, Ch. 12, L. 1979.

Part 2

Damages

27-1-201. Detriment defined. Detriment is a loss or harm suffered in person or property.

History: En. Sec. 4271, Civ. C. 1895; re-en. Sec. 6041, Rev. C. 1907; re-en. Sec. 8660, R.C.M. 1921; Cal. Civ. C. Sec. 3282; Field Civ. C. Sec. 1833; re-en. Sec. 8660, R.C.M. 1935; R.C.M. 1947, 17-202.

27-1-202. Right to compensatory damages. Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages.

History: En. Sec. 4270, Civ. C. 1895; re-en. Sec. 6040, Rev. C. 1907; re-en. Sec. 8659, R.C.M. 1921; Cal. Civ. C. Sec. 3281; Field Civ. C. Sec. 1832; re-en. Sec. 8659, R.C.M. 1935; R.C.M. 1947, 17-201.

27-1-203. Right to damages for detriment resulting after suit brought and for future detriment. Damages may be awarded in a judicial proceeding for detriment resulting after the commencement thereof or certain to result in the future.

History: En. Sec. 4272, Civ. C. 1895; re-en. Sec. 6042, Rev. C. 1907; re-en. Sec. 8661, R.C.M. 1921; Cal. Civ. C. Sec. 3283; Field Civ. C. Sec. 1834; re-en. Sec. 8661, R.C.M. 1935; R.C.M. 1947, 17-203.

27-1-204. Nominal damages when no appreciable detriment. When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages.

History: En. Sec. 4367, Civ. C. 1895; re-en. Sec. 6088, Rev. C. 1907; re-en. Sec. 8706, R.C.M. 1921; Cal. Civ. C. Sec. 3360; Field Civ. C. Sec. 1879; re-en. Sec. 8706, R.C.M. 1935; R.C.M. 1947, 17-608.

27-1-205 through 27-1-210 reserved.

27-1-211. Right to interest. Every person who is entitled to recover damages certain or capable of being made certain by calculation and the right to recover which is vested in him upon a particular day is entitled also to recover interest thereon from that day except during such time as the debtor is prevented by law or by the act of the creditor from paying the debt.

History: En. Sec. 4280, Civ. C. 1895; re-en. Sec. 6043, Rev. C. 1907; re-en. Sec. 8662, R.C.M. 1921; Cal. Civ. C. Sec. 3287; Field Civ. C. Sec. 1835; re-en. Sec. 8662, R.C.M. 1935; R.C.M. 1947, 17-204.

27-1-212. When award of interest discretionary. In an action for the breach of an obligation not arising from contract and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury. This section does not apply in actions for recovery of damages arising from injury to a person or property brought against a governmental entity under Title 2, chapter 9, parts 1 through 3, as amended.

History: En. Sec. 4281, Civ. C. 1895; re-en. Sec. 6044, Rev. C. 1907; re-en. Sec. 8663, R.C.M. 1921; Cal. Civ. C. Sec. 3288; Field Civ. C. Sec. 1836; re-en. Sec. 8663, R.C.M. 1935; amd. Sec. 3, Ch. 234, L. 1977; R.C.M. 1947, 17-205.

27-1-213. Validity of interest rate set by contract. Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation.

History: En. Sec. 4282, Civ. C. 1895; re-en. Sec. 6045, Rev. C. 1907; re-en. Sec. 8664, R.C.M. 1921; Cal. Civ. C. Sec. 3289; Field Civ. C. Sec. 1837; re-en. Sec. 8664, R.C.M. 1935; R.C.M. 1947, 17-206.

27-1-214. Waiver of interest by accepting principal. Accepting payment of the whole principal, as such, waives all claim to interest.

History: En. Sec. 4283, Civ. C. 1895; re-en. Sec. 6046, Rev. C. 1907; re-en. Sec. 8665, R.C.M. 1921; Cal. Civ. C. Sec. 3290; Field Civ. C. Sec. 1838; re-en. Sec. 8665, R.C.M. 1935; R.C.M. 1947, 17-207.

27-1-215 through 27-1-220 reserved.

27-1-221. When exemplary damages allowed. In any action for a breach of an obligation not arising from contract where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant.

History: En. Sec. 4290, Civ. C. 1895; re-en. Sec. 6047, Rev. C. 1907; re-en. Sec. 8666, R.C.M. 1921; Cal. Civ. C. Sec. 3294; Field. Civ. C. Sec. 1839; re-en. Sec. 8666, R.C.M. 1935; R.C.M. 1947, 17-208.

27-1-222. Exemplary damages for inhumane injuries to animals. For wrongful injuries to animals, being subjects of property, committed willfully or by gross negligence in disregard of humanity, exemplary damages may be given.

History: En. Sec. 4337, Civ. C. 1895; re-en. Sec. 6075, Rev. C. 1907; re-en. Sec. 8693, R.C.M. 1921; Cal. Civ. C. Sec. 3340; Field Civ. C. Sec. 1867; re-en. Sec. 8693, R.C.M. 1935; R.C.M. 1947; 17-408.

27-1-223. Damages for injuries or death inflicted in a duel. If any person slays or permanently disables another person in a duel in this state, he must provide for the maintenance of the spouse and minor children of the person slain or permanently disabled in such manner and at such cost, either by aggregate compensation in damages to each or by a monthly, quarterly, or annual allowance, as is determined by the court and he is liable for and must pay all debts of the person slain or permanently disabled.

History: Ap. p. Sec. 4353, Civ. C. 1895; re-en. Sec. 6079, Rev. C. 1907; re-en. Sec. 8697, R.C.M. 1921; Cal. Civ. C. Sec. 3347; re-en. Sec. 8697, R.C.M. 1935; amd. Sec. 11, Ch. 535, L. 1975; Sec. 17-504, R.C.M. 1947; Ap. p. Sec. 4354, Civ. C. 1895; re-en. Sec. 6080, Rev. C. 1907; re-en. Sec. 8698, R.C.M. 1921; Cal. Civ. C. Sec. 3348; re-en. Sec. 8698, R.C.M. 1935; Sec. 17-505, R.C.M. 1947; R.C.M. 1947, 17-504, 17-505; amd. Sec. 2, Ch. 12, L. 1979.

Part 3

Measure of Damages

27-1-301. Prescribed damages exclusive of exemplary damages and interest. The damages prescribed by 27-1-204, 27-1-222, 27-1-223, and this part are exclusive of exemplary damages and interest except where those are expressly mentioned.

History: En. Sec. 4364, Civ. C. 1895; re-en. Sec. 6085, Rev. C. 1907; re-en. Sec. 8703, R.C.M. 1921; Cal. Civ. C. Sec. 3357; Field Civ. C. Sec. 1876; re-en. Sec. 8703, R.C.M. 1935; R.C.M. 1947, 17-605.

27-1-302. Damages to be reasonable. Damages must in all cases be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages contrary to substantial justice, no more than reasonable damages can be recovered.

History: En. Sec. 4366, Civ. C. 1895; re-en. Sec. 6087, Rev. C. 1907; re-en. Sec. 8705, R.C.M. 1921; Cal. Civ. C. Sec. 3359; Field. Civ. C. Sec. 1878; re-en. Sec. 8705, R.C.M. 1935; R.C.M. 1947, 17-607.

27-1-303. Limitation of damages for breach of obligation. No person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides unless a greater recovery is specified by statute.

History: En. Sec. 4365, Civ. C. 1895; re-en. Sec. 6086, Rev. C. 1907; re-en. Sec. 8704, R.C.M. 1921; Cal. Civ. C. Sec. 3358; Field. Civ. C. Sec. 1877; re-en. Sec. 8704, R.C.M. 1935; R.C.M. 1947, 17-606; amd. Sec. 3, Ch. 12, L. 1979.

27-1-304. Value of written instrument. For the purpose of estimating damages, the value of an instrument in writing is presumed to be equal to that of the property to which it entitles the owner.

History: En. Sec. 4363, Civ. C. 1895; re-en. Sec. 6084, Rev. C. 1907; re-en. Sec. 8702, R.C.M. 1921; Cal. Civ. C. Sec. 3356; Based on Field. Civ. C. Sec. 1875; re-en. Sec. 8702, R.C.M. 1935; R.C.M. 1947, 17-604.

27-1-305. Property of peculiar value. Where a certain property has a peculiar value to a person recovering damages for deprivation thereof or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof or against a willful wrongdoer.

History: En. Sec. 4362, Civ. C. 1895; re-en. Sec. 6083, Rev. C. 1907; re-en. Sec. 8701, R.C.M. 1921; Cal. Civ. C. Sec. 3355; Field Civ. C. Sec. 1874; re-en. Sec. 8701, R.C.M. 1935; R.C.M. 1947, 17-603.

27-1-306 through 27-1-310 reserved.

27-1-311. Breach of contract. For the breach of an obligation arising from contract, the measure of damages, except when otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment which was proximately caused thereby or in the ordinary course of things would be likely to result therefrom. Damages which are not clearly ascertainable in both their nature and origin cannot be recovered for a breach of contract.

History: Ap. p. Sec. 4300, Civ. C. 1895; re-en. Sec. 6048, Rev. C. 1907; re-en. Sec. 8667, R.C.M. 1921; Cal. Civ. C. Sec. 3300; Based on Field Civ. C. Sec. 1840; re-en. Sec. 8667, R.C.M. 1935; Sec.

17-301, R.C.M. 1947; Ap. p. Sec. 4301, Civ. C. 1895; re-en. Sec. 6049, Rev. C. 1907; re-en. Sec. 8668, R.C.M. 1921; Cal. Civ. C. Sec. 3301; Field Civ. C. Sec. 1841; re-en. Sec. 8668, R.C.M. 1935; Sec. 17-302, R.C.M. 1947; R.C.M. 1947, 17-301, 17-302; amd. Sec. 4, Ch. 12, L. 1979.

27-1-312. Breach of obligation to pay money. The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation with interest thereon.

History: En. Sec. 4302, Civ. C. 1895; re-en. Sec. 6050, Rev. C. 1907; re-en. Sec. 8669, R.C.M. 1921; Cal. Civ. C. Sec. 3302; Field Civ. C. Sec. 1842; re-en. Sec. 8669, R.C.M. 1935; R.C.M. 1947, 17-303.

27-1-313. Breach of warranty of agent's authority. The detriment caused by the breach of a warranty of an agent's authority is deemed to be the amount which could have been recovered and collected from his principal if the warranty had been complied with and the reasonable expenses of legal proceedings taken in good faith to enforce the act of the agent against his principal.

History: En. Sec. 4318, Civ. C. 1895; re-en. Sec. 6066, Rev. C. 1907; re-en. Sec. 8684, R.C.M. 1921; Cal. Civ. C. Sec. 3318; Field Civ. C. Sec. 1858; re-en. Sec. 8684, R.C.M. 1935; R.C.M. 1947, 17-318.

27-1-314. Breach of agreement to convey real property. The detriment caused by the breach of an agreement to convey an estate in real property is considered to be the price paid and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon. If the breach was in bad faith and the agreed price was less than the value of the estate, the detriment is also considered to include the difference between the agreed price and the value of the estate at the time of the breach and the expenses properly incurred in preparing to enter upon the land.

History: En. Sec. 4306, Civ. C. 1895; re-en. Sec. 6054, Rev. C. 1907; re-en. Sec. 8672, R.C.M. 1921; Cal. Civ. C. Sec. 3306; Field Civ. C. Sec. 1846; re-en. Sec. 8672, R.C.M. 1935; R.C.M. 1947, 17-306; amd. Sec. 5, Ch. 12, L. 1979.

27-1-315. Breach of agreement to buy real property. The detriment caused by the breach of an agreement to purchase an estate in real property is deemed to be the excess, if any, of the amount which would have been due to the seller under the contract over the value of the property to him.

History: En. Sec. 4307, Civ. C. 1895; re-en. Sec. 6055, Rev. C. 1907; re-en. Sec. 8673, R.C.M. 1921; Cal. Civ. C. Sec. 3307; Field Civ. C. Sec. 1847; re-en. Sec. 8673, R.C.M. 1935; R.C.M. 1947, 17-307.

27-1-316. Breach of convenants in grants of estates in real property. (1) The detriment caused by the breach of a covenant of seizin, of right to convey, of warranty, or of quiet enjoyment in a grant of an estate in real property is deemed to be:

(a) the price paid to the grantor or, if the breach is partial only, such proportion of the price as the value of the property affected by the breach bore at the time of the grant to the value of the whole property;

(b) interest thereon for the time during which the grantee derived no benefit from the property, not exceeding 5 years;

(c) any expenses properly incurred by the covenantee in defending his possession.

(2) The detriment caused by the breach of a covenant against encumbrances in a grant of an estate in real property is deemed to be the amount which has been actually expended by the covenantee in extinguishing either the principal or interest thereof, not exceeding in the former case a proportion of the price paid to the grantor equivalent to the relative value at the time of the grant of the property affected by the breach as compared with the whole or, in the latter case, interest on a like amount.

History: (1)En. Sec. 4304, Civ. C. 1895; re-en. Sec. 6052, Rev. C. 1907; re-en. Sec. 8670, R.C.M. 1921; Cal. Civ. C. Sec. 3304; Based on Field Civ. C. Sec. 1844; re-en. Sec. 8670, R.C.M. 1935; Sec. 17-304, R.C.M. 1947; (2)En. Sec. 4305, Civ. C. 1895; re-en. Sec. 6053, Rev. C. 1907; re-en. Sec. 8671, R.C.M. 1921; Cal. Civ. C. Sec. 3305; Field Civ. C. Sec. 1845; re-en. Sec. 8671, R.C.M. 1935; Sec. 17-305, R.C.M. 1947; R.C.M. 1947, 17-304, 17-305.

27-1-317. Breach of obligation other than contract. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

History: En. Sec. 4330, Civ. C. 1895; re-en. Sec. 6068, Rev. C. 1907; re-en. Sec. 8686, R.C.M. 1921; Cal. Civ. C. Sec. 3333; Field. Civ. C. Sec. 1860; re-en. Sec. 8686, R.C.M. 1935; R.C.M. 1947, 17-401.

27-1-318. Wrongful occupation of real property. The detriment caused by the wrongful occupation of real property in cases not otherwise provided for in this code is deemed to be the value of the use of the property for the time of such occupation, not exceeding 5 years next preceding the commencement of the action or proceeding to enforce the right to damages, and the costs, if any, of recovering the possession.

History: En. Sec. 4331, Civ. C. 1895; re-en. Sec. 6069, Rev. C. 1907; re-en. Sec. 8687, R.C.M. 1921; Cal. Civ. C. Sec. 3334; Based on Field Civ. C. Sec. 1861; re-en. Sec. 8687, R.C.M. 1935; R.C.M. 1947, 17-402.

27-1-319. Willful holding over of real property. For willfully holding over real property by a person who entered upon the same as guardian or trustee for an infant or by right of an estate terminable with any life or lives, after the termination of the trust or particular estate, without the consent of the party immediately entitled after such termination, the measure of damages is the value of the profits received during such holding over.

History: En. Sec. 4332, Civ. C. 1895; re-en. Sec. 6070, Rev. C. 1907; re-en. Sec. 8688, R.C.M. 1921; Cal. Civ. C. Sec. 3335; Field. Civ. C. Sec. 1862; re-en. Sec. 8688, R.C.M. 1935; R.C.M. 1947, 17-403.

27-1-320. Conversion of personal property. (1) The detriment caused by the wrongful conversion of personal property is presumed to be:

(a) the value of the property at the time of its conversion with the interest from that time or, when the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict without interest, at the option of the injured party; and

(b) a fair compensation for the time and money properly expended in pursuit of the property.

(2) The presumption declared by subsection (1) cannot be repelled in favor of one whose possession was wrongful from the beginning by his subsequent application of the property to the benefit of the owner without such owner's consent.

History: (1)En. Sec. 4333, Civ. C. 1895; re-en. Sec. 6071, Rev. C. 1907; re-en. Sec. 8689, R.C.M. 1921; Cal. Civ. C. Sec. 3336; Field Civ. C. Sec. 1863; re-en. Sec. 8689, R.C.M. 1935; Sec. 17-404, R.C.M. 1947; (2)En. Sec. 4334, Civ. C. 1895; re-en. Sec. 6072, Rev. C. 1907; re-en. Sec. 8690, R.C.M. 1921; Cal. Civ. C. Sec. 3337; Field. Civ. C. Sec. 1864; re-en. Sec. 8690, R.C.M. 1935; Sec. 17-405, R.C.M. 1947; R.C.M. 1947, 17-404, 17-405; amd. Sec. 6, Ch. 12, L. 1979.

27-1-321. Conversion of personal property — damages of lienholder. One having a mere lien on personal property cannot recover greater damages for its conversion, from one having a right thereto superior to his after his lien is discharged, than the amount secured by the lien and the compensation allowed by 27-1-320(1) for the loss of time and expenses.

History: En. Sec. 4335, Civ. C. 1895; re-en. Sec. 6073, Rev. C. 1907; re-en. Sec. 8691, R.C.M. 1921; Cal. Civ. C. Sec. 3338; Field Civ. C. Sec. 1865; re-en. Sec. 8691, R.C.M. 1935; R.C.M. 1947, 17-406.

27-1-322. Seduction. The damages for seduction rest in the sound discretion of the jury.

History: En. Sec. 4336, Civ. C. 1895; re-en. Sec. 6074, Rev. C. 1907; re-en. Sec. 8692, R.C.M. 1921; Cal. Civ. C. Sec. 3339; Field Civ. C. Sec. 1866; re-en. Sec. 8692, R.C.M. 1935; R.C.M. 1947, 17-407.

27-1-323. Wrongful death. In every action under 27-1-512 and 27-1-513, such damages may be given as under all the circumstances of the case may be just.

History: En. Sec. 1, p. 561, Cod. Stat. 1871; en. Sec. 14, p. 42, L. 1877; re-en. Sec. 14, 1st Div. Rev. Stat. 1879; re-en. Sec. 14, 1st Div. Comp. Stat. 1887; re-en. Sec. 579, C. Civ. Proc. 1895; re-en. Sec. 6486, Rev. C. 1907; re-en. Sec. 9076, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 377; re-en. Sec. 9076, R.C.M. 1935; R.C.M. 1947, 93-2810(part).

Part 4

Specific and Preventive Relief

27-1-401. When specific or preventive relief permitted. Specific or preventive relief may be given in the cases specified in this part and Title 28, chapter 2, parts 16 and 17, and in no others. Neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, or to enforce the penalty or forfeiture in any case.

History: Ap. p. Sec. 4380, Civ. C. 1895; re-en. Sec. 6089, Rev. C. 1907; re-en. Sec. 8707, R.C.M. 1921; Cal. Civ. C. Sec. 3366; Field Civ. C. Sec. 1880; re-en. Sec. 8707, R.C.M. 1935; Sec. 17-701, R.C.M. 1947; Ap. p. Sec. 4383, Civ. C. 1895; re-en. Sec. 6092, Rev. C. 1907; re-en. Sec. 8710, R.C.M. 1921; Cal. Civ. C. Sec. 3369; Field Civ. C. Sec. 1883; re-en. Sec. 8710, R.C.M. 1935; Sec. 17-704, R.C.M. 1947; R.C.M. 1947, 17-701, 17-704.

27-1-402. How specific relief given. Specific relief is given by:

(1) taking possession of a thing and delivering it to a claimant;

(2) compelling the party himself to do that which ought to be done; or

(3) declaring and determining the rights of parties otherwise than by an award of damages.

History: En. Sec. 4381, Civ. C. 1895; re-en. Sec. 6090, Rev. C. 1907; re-en. Sec. 8708, R.C.M. 1921; Cal. Civ. C. Sec. 3367; Field Civ. C. Sec. 1881; re-en. Sec. 8708, R.C.M. 1935; R.C.M. 1947, 17-702.

27-1-403. How preventive relief given. Preventive relief is given by rohibiting a party from doing that which ought not to be done. Preventive elief is granted by injunction, provisional or final.

History: Ap. p. Sec. 4382, Civ. C. 1895; re-en. Sec. 6091, Rev. C. 1907; re-en. Sec. 8709, R.C.M. 921; Cal. Civ. C. Sec. 3368; Field. Civ. C. Sec. 1882; re-en. Sec. 8709, R.C.M. 1935; Sec. 17-703, .C.M. 1947; Ap. p. Sec. 4460, Civ. C. 1895; re-en. Sec. 6118, Rev. C. 1907; re-en. Sec. 8736, R.C.M. 921; Cal. Civ. C. Sec. 3420; Field Civ. C. Sec. 1909; re-en. Sec. 8736, R.C.M. 1935; Sec. 17-1101, .C.M. 1947; R.C.M. 1947, 17-703, 17-1101.

27-1-404 through 27-1-410 reserved.

27-1-411. When specific performance of an obligation may be ompelled. Except as otherwise provided in this part and Title 28, chapter , parts 16 and 17, the specific performance of an obligation may be compelled when:

(1) the act to be done is in the performance, wholly or partly, of an xpress trust;

(2) the act to be done is such that pecuniary compensation for its nonerformance would not afford adequate relief;

(3) it would be extremely difficult to ascertain the actual damage caused y the nonperformance of the act to be done; or

(4) it has been expressly agreed in writing, between the parties to the ontract, that specific performance thereof may be required by either party r that damages shall not be considered adequate relief.

History: En. Sec. 4410, Civ. C. 1895; re-en. Sec. 6096, Rev. C. 1907; re-en. Sec. 8714, R.C.M. 921; Cal. Civ. C. Sec. 3384; Field Civ. C. Sec. 1887; re-en. Sec. 8714, R.C.M. 1935; R.C.M. 1947, 7-801.

27-1-412. Obligations which cannot be specifically enforced. he following obligations cannot be specifically enforced:

(1) an obligation to render personal service or to employ another therein;

(2) an agreement to marry or live with another;

(3) an agreement to submit a controversy to arbitration;

(4) an agreement to perform an act which the party has not power to perrm lawfully when required to do so;

(5) an agreement to procure the act or consent of the spouse of the conracting party or of any other third person; or

(6) an agreement the terms of which are not sufficiently certain to make he precise act which is to be done clearly ascertainable.

History: En. Sec. 4416, Civ. C. 1895; re-en. Sec. 6102, Rev. C. 1907; re-en. Sec. 8720, R.C.M. 21; Cal. Civ. C. Sec. 3390; Field Civ. C. Sec. 1893; re-en. Sec. 8720, R.C.M. 1935; amd. Sec. 12, h. 535, L. 1975; R.C.M. 1947, 17-807.

27-1-413. Specific performance not to be oppressive. Specific erformance cannot be compelled when it would operate more harshly upon e party required to perform than its refusal would operate upon the party eeking it.

History: En. Sec. 4419, Civ. C. 1895; re-en. Sec. 6105, Rev. C. 1907; re-en. Sec. 8723, R.C.M. 21; Field Civ. C. Sec. 1896; re-en. Sec. 8723, R.C.M. 1935; R.C.M. 1947, 17-810.

27-1-414. Right to specific performance to be mutual. (1) When ther of the parties to an obligation is entitled to a specific performance thereof according to the provisions of 27-1-411, the other party is also entitled to it, though not within those provisions.

(2) Neither party to any obligation can be compelled specifically to perform it unless the other party thereto has performed or is compellable specifically to perform everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance.

History: (1)En. Sec. 4411, Civ. C. 1895; re-en. Sec. 6097, Rev. C. 1907; re-en. Sec. 8715, R.C.M. 1921; Cal. Civ. C. Sec. 3385; Field Civ. C. Sec. 1888; re-en. Sec. 8715, R.C.M. 1935; Sec. 17-802, R.C.M. 1947; (2)En. Sec. 4412, Civ. C. 1895; re-en. Sec. 6098, Rev. C. 1907; re-en. Sec. 8716, R.C.M. 1921; Cal. Civ. C. Sec. 3386; Field Civ. C. Sec. 1889; re-en. Sec. 8716, R.C.M. 1935; Sec. 17-803, R.C.M. 1947; R.C.M. 1947, 17-802, 17-803.

27-1-415. Parties who cannot be compelled to perform. Specific performance cannot be enforced against a party to a contract in any of the following cases:

(1) if he has not received an adequate consideration for the contract;

(2) if it is not, as to him, just and reasonable;

(3) if his assent was obtained by the misrepresentations, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract or by any promise of such party which has not been substantially fulfilled; or

(4) if his assent was given under the influence of mistake, misapprehension, or surprise, except that where the contract provides for compensation in case of mistake, a mistake within the scope of such provision may be compensated for and the contract specifically enforced in other respects if proper to be so enforced.

History: En. Sec. 4417, Civ. C. 1895; re-en. Sec. 6103, Rev. C. 1907; re-en. Sec. 8721, R.C.M. 1921; Cal. Civ. C. Sec. 3391; Field Civ. C. Sec. 1894; re-en. Sec. 8721, R.C.M. 1935; R.C.M. 1947, 17-808.

27-1-416. Parties who cannot obtain specific performance. Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party except where his failure to perform is only partial and either entirely immaterial or capable of being fully compensated, in which case specific performance may be compelled upon full compensation being made for the default.

History: En. Sec. 4418, Civ. C. 1895; re-en. Sec. 6104, Rev. C. 1907; re-en. Sec. 8722, R.C.M. 1921; Cal. Civ. C. Sec. 3392; Field Civ. C. Sec. 1895; re-en. Sec. 8722, R.C.M. 1935; R.C.M. 1947, 17-809.

27-1-417. Specific performance by party who signed when other party did not sign contract. A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed or offers to perform it on his part and the case is otherwise proper for enforcing specific performance.

History: En. Sec. 4414, Civ. C. 1895; re-en. Sec. 6100, Rev. C. 1907; re-en. Sec. 8718, R.C.M. 1921; Cal. Civ. C. Sec. 3388; Field. Civ. C. Sec. 1891; re-en. Sec. 8718, R.C.M. 1935; R.C.M. 1947, 17-805.

27-1-418. Liquidation of damages not a bar to specific performance. A contract otherwise proper to be specifically enforced may be thus nforced though a penalty is imposed or the damages are liquidated for its reach and the party in default is willing to pay the same.

History: En. Sec. 4415, Civ. C. 1895; re-en. Sec. 6101, Rev. C. 1907; re-en. Sec. 8719, R.C.M. 921; Cal. Civ. C. Sec. 3389; Field Civ. C. Sec. 1892; re-en. Sec. 8719, R.C.M. 1935; R.C.M. 1947, 7-806.

27-1-419. Specific performance of agreement to transfer prop-rty — distinction between real and personal property. It is to be resumed that the breach of an agreement to transfer real property cannot e adequately relieved by pecuniary compensation and that the breach of an greement to transfer personal property can be thus relieved.

History: En. Sec. 4413, Civ. C. 1895; re-en. Sec. 6099, Rev. C. 1907; re-en. Sec. 8717, R.C.M. 921; Cal. Civ. C. Sec. 3387; Field Civ. C. Sec. 1890; re-en. Sec. 8717, R.C.M. 1935; R.C.M. 1947, 7-804.

27-1-420. No specific performance of agreement to buy prop-rty when title not clear. An agreement for the sale of property cannot e specifically enforced in favor of a seller who cannot give to the buyer a itle free from reasonable doubt.

History: En. Sec. 4420, Civ. C. 1895; re-en. Sec. 6106, Rev. C. 1907; re-en. Sec. 8724, R.C.M. 921; Cal. Civ. C. Sec. 3394; Field Civ. C. Sec. 1897; re-en. Sec. 8724, R.C.M. 1935; R.C.M. 1947, 7-811.

27-1-421. Compelling performance of successor in interest in itle — obligations respecting real property. Whenever an obligation respect to real property would be specifically enforced against a particular erson, it may be in like manner enforced against any other person claiming nder him by a title created subsequently to the obligation except a purhaser or encumbrancer in good faith and for value, and except that any such erson may exonerate himself by conveying all his estate to the person entied to enforce the obligation.

History: En. Sec. 4421, Civ. C. 1895; re-en. Sec. 6107, Rev. C. 1907; re-en. Sec. 8725, R.C.M. 921; Cal. Civ. C. Sec. 3395; Field Civ. C. Sec. 1898; re-en. Sec. 8725, R.C.M. 1935; R.C.M. 1947, 7-812.

27-1-422 through 27-1-430 reserved.

27-1-431. Judgment for possession of or title to real property. person entitled to specific real property, by reason either of a perfected tle or of a claim to title which ought to be perfected, may recover the same the manner prescribed by this code, either by a judgment for its posseson to be executed by the sheriff or by a judgment requiring the other party perfect the title and to deliver possession of the property.

History: En. Sec. 4390, Civ. C. 1895; re-en. Sec. 6093, Rev. C. 1907; re-en. Sec. 8711, R.C.M. 21; Cal. Civ. C. Sec. 3375; Field. Civ. C. Sec. 1884; re-en. Sec. 8711, R.C.M. 1935; R.C.M. 1947, -705.

27-1-432. Judgment for delivery of personal property. A person ntitled to the immediate possession of specific personal property may ecover the same in the manner provided by this code. Any person having e possession or control of a particular article of personal property of which e is not the owner may be compelled specifically to deliver it to the person ntitled to its immediate possession.

History: Ap. p. Sec. 4400, Civ. C. 1895; re-en. Sec. 6094, Rev. C. 1907; re-en. Sec. 8712, R.C.M. 21; Cal. Civ. C. Sec. 3379; Field Civ. C. Sec. 1885; re-en. Sec. 8712, R.C.M. 1935; Sec. 17-706,

R.C.M. 1947; Ap. p. Sec. 4401, Civ. C. 1895; re-en. Sec. 6095, Rev. C. 1907; re-en. Sec. 8713, R.C.M. 1921; Cal. Civ. C. Sec. 3380; Based on Field Civ. C. Sec. 1886; re-en. Sec. 8713, R.C.M. 1935; Sec. 17-707, R.C.M. 1947; R.C.M. 1947, 17-706, 17-707.

27-1-433. Cancellation of written instrument. (1) A written instrument in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable may, upon his application, be so adjudged and ordered to be delivered up or canceled.

(2) An instrument the invalidity of which is apparent upon its face or upon the face of another instrument which is necessary to the use of the former in evidence is not to be deemed capable of causing injury within the provisions of subsection (1).

(3) Where an instrument is evidence of different rights or obligations, it may be canceled in part and allowed to stand for the residue.

History: (1)En. Sec. 4450, Civ. C. 1895; re-en. Sec. 6115, Rev. C. 1907; re-en. Sec. 8733, R.C.M. 1921; Cal. Civ. C. Sec. 3412; Field Civ. C. Sec. 1906; re-en. Sec. 8733, R.C.M. 1935; Sec. 17-1001, R.C.M. 1947; (2)En. Sec. 4451, Civ. C. 1895; re-en. Sec. 6116, Rev. C. 1907; re-en. Sec. 8734, R.C.M. 1921; Cal. Civ. C. Sec. 3413; Field Civ. C. Sec. 1907; re-en. Sec. 8734, R.C.M. 1935; Sec. 17-1002, R.C.M. 1947; (3)En. Sec. 4452, Civ. C. 1895; re-en. Sec. 6117, Rev. C. 1907; re-en. Sec. 8735, R.C.M. 1921; Cal. Civ. C. Sec. 3414; Field Civ. C. Sec. 1908; re-en. Sec. 8735, R.C.M. 1935; Sec. 17-1003, R.C.M. 1947; R.C.M. 1947, 17-1001, 17-1002, 17-1003.

Part 5

Right to Bring Action or Assert Defense

27-1-501. Survival of cause of action or defense — death or disability or transfer of interest. An action, cause of action, or defense does not abate because of the death or disability of a party or the transfer of any interest therein, but whenever the cause of action or defense arose in favor of such party prior to his death or disability or transfer of interest therein, it survives and may be maintained by his representatives or successors in interest. If the action has not been begun or defense interposed, the action may be begun or defense interposed in the name of his representatives or successors in interest. If the action has been begun or defense interposed, the action or proceeding may be continued as provided in Rule 25, M.R.Civ.P.

History: En. Sec. 16, p. 45, Bannack Stat.; re-en. Sec. 16, p. 137, L. 1867; re-en. Sec. 16, p. 29, Cod. Stat. 1871; amd. Sec. 22, p. 43, L. 1877; re-en. Sec. 22, 1st Div. Rev. Stat. 1879; en. Sec. 1, p. 98, L. 1883; re-en. Sec. 22, 1st Div. Comp. Stat. 1887; amd. Sec. 587, C. Civ. Proc. 1895; re-en. Sec. 6494, Rev. C. 1907; re-en. Sec. 9086, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 385; re-en. Sec. 9086, R.C.M. 1935; repealed Sec. 84, Ch. 13, L. 1961; reinstated Sec. 2, Ch. 14, L. 1963; R.C.M. 1947, 93-2824; amd. Sec. 7, Ch. 12, L. 1979.

27-1-502. Survival of counterclaim — death or assignment. When cross-demands have existed between persons under such circumstances that if one had brought an action against the other a counterclaim could have been set up, the two demands shall be deemed compensated so far as they equal each other and neither can be deprived of the benefit thereof by the assignment or death of the other.

History: En. Sec. 48, p. 52, Bannack Stat.; re-en. Sec. 48, p. 143, L. 1867; re-en. Sec. 58, p. 39, Cod. Stat. 1871; re-en. Sec. 89, p. 61, L. 1877; re-en. Sec. 89, 1st Div. Rev. Stat. 1879; re-en. Sec.

91, 1st Div. Comp. Stat. 1887; amd. Sec. 698, C. Civ. Proc. 1895; re-en. Sec. 6548, Rev. C. 1907; re-en. Sec. 9145, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 440; re-en. Sec. 9145, R.C.M. 1935; R.C.M. 1947, 93-3409.

27-1-503. What defenses to action survive assignment of right to action. In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any setoff or other defense existing at the time of or before notice of the assignment, but this section shall apply only to the extent not otherwise provided for in the Uniform Commercial Code.

History: En. Sec. 5, p. 44, Bannack Stat.; re-en. Sec. 5, p. 136, L. 1867; re-en. Sec. 5, p. 28, Cod. Stat. 1871; re-en. Sec. 5, p. 40, L. 1877; re-en. Sec. 5, 1st Div. Rev. Stat. 1879; re-en. Sec. 5, 1st Div. Comp. Stat. 1887; re-en. Sec. 571, C. Civ. Proc. 1895; re-en. Sec. 6478, Rev. C. 1907; re-en. Sec. 9068, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 368; re-en. Sec. 9068, R.C.M. 1935; amd. Sec. 11-157, Ch. 264, L. 1963; R.C.M. 1947, 93-2802.

27-1-504 through 27-1-510 reserved.

27-1-511. Right of minor to bring civil action or other proceeding. A minor may enforce his rights by civil action or other legal proceedings in the same manner as a person of full age except that a guardian must conduct the same.

History: En. Sec. 25, Civ. C. 1895; re-en. Sec. 3599, Rev. C. 1907; re-en. Sec. 5687, R.C.M. 1921; Cal. Civ. C. Sec. 42; Field Civ. C. Sec. 25; re-en. Sec. 5687, R.C.M. 1935; R.C.M. 1947, 64-114.

27-1-512. Action by parent or guardian for injury to or death of child or ward. Either parent may maintain an action for the injury or death of a minor child and a guardian for injury or death of a ward when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death or, if such person be employed by another person who is responsible for his conduct, also against such other person.

History: En. Sec. 11, p. 44, Bannack Stat.; amd. Sec. 11, p. 136, L. 1867; re-en. Sec. 11, p. 29, Cod. Stat. 1871; re-en. Sec. 13, p. 42, L. 1877; re-en. Sec. 13, 1st Div. Rev. Stat. 1879; re-en. Sec. 13, 1st Div. Comp. Stat. 1887; amd. Sec. 578, C. Civ. Proc. 1895; re-en. Sec. 6485, Rev. C. 1907; re-en. Sec. 9075, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 376; re-en. Sec. 9075, R.C.M. 1935; amd. Sec. 52, Ch. 535, L. 1975; R.C.M. 1947, 93-2809.

27-1-513. Action for wrongful death of adult. When the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death or, if such person be employed by another person who is responsible for his conduct, then also against such other person.

History: En. Sec. 1, p. 561, Cod. Stat. 1871; en. Sec. 14, p. 42, L. 1877; re-en. Sec. 14, 1st Div. Rev. Stat. 1879; re-en. Sec. 14, 1st Div. Comp. Stat. 1887; re-en. Sec. 579, C. Civ. Proc. 1895; re-en. Sec. 6486, Rev. C. 1907; re-en. Sec. 9076, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 377; re-en. Sec. 9076, R.C.M. 1935; R.C.M. 1947, 93-2810(part).

27-1-514. Who may sue for whose seduction. (1) The rights of personal relations forbid the seduction of a spouse, child, orphan, or servant.

(2) Either parent may prosecute as plaintiff for the seduction of the child and the guardian for the seduction of the ward, though the child or ward be not living with or in the service of the plaintiff at the time of the seduction or afterwards and there be no loss of service.

(3) An unmarried person may prosecute as plaintiff an action for his or her own seduction and may recover therein such damages, pecuniary or exemplary, as are assessed in such person's favor.

History: (1)En. Sec. 35, Civ. C. 1895; re-en. Sec. 3605, Rev. C. 1907; re-en. Sec. 5693, R.C.M 1921; Cal. Civ. C. Sec. 49; Field Civ. C. Sec. 32; re-en. Sec. 5693, R.C.M. 1935; amd. Sec. 30, Ch 535, L. 1975; Sec. 64-209, R.C.M. 1947; (2)En. Sec. 12, p. 41, L. 1877; re-en. Sec. 12, 1st Div. Rev Stat. 1879; re-en. Sec. 12, 1st Div. Comp. Stat. 1887; re-en. Sec. 577, C. Civ. Proc. 1895; re-en. Sec 6484, Rev. C. 1907; re-en. Sec. 9074, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 375; re-en. Sec. 9074 R.C.M. 1935; amd. Sec. 51, Ch. 535, L. 1975; Sec. 92-2808, R.C.M. 1947; (3)En. Sec. 11, p. 41, L 1877; re-en. Sec. 11, 1st Div. Rev. Stat. 1879; re-en. Sec. 11, 1st Div. Comp. Stat. 1887; re-en. Sec 576, C. Civ. Proc. 1895; re-en. Sec. 6483, Rev. C. 1907; re-en. Sec. 9073, R.C.M. 1921; Cal. C. Civ Proc. Sec. 374; re-en. Sec. 9073, R.C.M. 1935; amd. Sec. 50, Ch. 535, L. 1975; Sec. 93-2807, R.C.M 1947; R.C.M. 1947, 64-209(3), 93-2807, 93-2808.

27-1-515. Protection of personal relations — abduction. The rights of personal relations forbid:

(1) the abduction of a parent from a child;

(2) the abduction or enticement of a wife from her husband or a husband from his wife, of a child from a parent or from a guardian entitled to its custody, or of a servant from a master.

History: En. Sec. 35, Civ. C. 1895; re-en. Sec. 3605, Rev. C. 1907; re-en. Sec. 5693, R.C.M. 1921 Cal. Civ. C. Sec. 49; Field Civ. C. Sec. 32; re-en. Sec. 5693, R.C.M. 1935; amd. Sec. 30, Ch. 535 L. 1975; R.C.M. 1947, 64-209(1), (2).

27-1-516. Injury to servant. The rights of personal relations forbid any injury to a servant which affects the servant's ability to serve the master.

History: En. Sec. 35, Civ. C. 1895; re-en. Sec. 3605, Rev. C. 1907; re-en. Sec. 5693, R.C.M. 1921 Cal. Civ. C. Sec. 49; Field Civ. C. Sec. 32; re-en. Sec. 5693, R.C.M. 1935; amd. Sec. 30, Ch. 535 L. 1975; R.C.M. 1947, 64-209(4).

Part 6

Abolition of Certain Causes of Action

27-1-601. Cause of action for alienation of affections abolished All civil causes of action for alienation of affections of husband or wife are hereby abolished.

History: En. Sec. 1, Ch. 200, L. 1963; R.C.M. 1947, 17-1201(part).

27-1-602. Cause of action for breach of promise abolished — right to damages for fraud and unjust enrichment preserved. All causes of action for breach of contract to marry are hereby abolished. However, where a plaintiff has suffered actual damage due to fraud or deceit or a defendant has been unjustly enriched, the plaintiff may maintain an action for fraud or deceit or unjust enrichment and recover therein only the actual damage proved or for the benefit wrongfully obtained or restitution of property wrongfully withheld where such action otherwise is maintainable under existing law.

History: En. Sec. 2, Ch. 200, L. 1963; R.C.M. 1947, 17-1202.

27-1-603. Acts within Montana not to give rise to abolished cause of action. No act done within this state after July 1, 1963, shall operate to give rise, either within or without this state, to any of the causes of action abolished by this part. No contract to marry which shall be made within this state after July 1, 1963, shall operate to give rise, either within or without this state, to any cause of action for breach thereof. It is the intention of this part to fix the effect, status, and character of such acts and contracts and to render them ineffective to support or give rise to any such causes of action within or without this state.

History: En. Sec. 3, Ch. 200, L. 1963; R.C.M. 1947, 17-1203.

27-1-604. Litigation and threat of litigation prohibited. Effective July 1, 1963, it shall be unlawful for any person, either as litigant or attorney, to file, cause to be filed, threaten to file, or threaten to cause to be filed in any court in this state any pleading or paper setting forth or seeking to recover upon any cause of action abolished or barred by this part, whether such cause of action arose within or without this state.

History: En. Sec. 4, Ch. 200, L. 1963; R.C.M. 1947, 17-1204.

27-1-605. Agreements settling or compromising abolished causes of action. (1) All contracts and instruments of every kind which, after July 1, 1963, may be executed within this state in payment, satisfaction, settlement, or compromise of any claim or cause of action abolished or barred by this part, whether such claim or cause of action arose within or without this state, are hereby declared to be contrary to the public policy of this state and absolutely void.

(2) It shall be unlawful to:

(a) cause, induce, or procure any person to execute such a contract or instrument;

(b) cause, induce, or procure any person to give, pay, transfer, or deliver any money or thing of value in payment, satisfaction, settlement, or compromise of any such claim or cause of action;

(c) receive, take, or accept any such money or thing of value in such payment, satisfaction, settlement, or compromise; or

(d) commence or cause to be commenced, either as litigant or attorney, in any court of this state any proceeding or action seeking to enforce or recover upon any such contract or instrument knowing it to be such, whether the same shall have been executed within or without this state.

(3) However, this section shall not apply to the payment, satisfaction, settlement, or compromise of any causes of action which are not abolished or barred by this part or any contracts or instruments heretofore executed or to the bona fide holder in due course of any negotiable instrument which may be executed after July 1, 1963.

History: En. Sec. 5, Ch. 200, L. 1963; R.C.M. 1947, 17-1205.

27-1-606. Criminal penalty. Any person who violates any of the provisions of this part is punishable upon conviction therefor by a fine of not less than $100 or more than $1,000 or imprisonment for a term of not less than 1 year or more than 5 years, in the discretion of the court.

History: En. Sec. 6, Ch. 200, L. 1963; R.C.M. 1947, 17-1206; amd. Sec. 8, Ch. 12, L. 1979.

Part 7

Liability

27-1-701. Liability for negligence as well as willful acts. Everyone is responsible not only for the results of his willful acts but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person except so far as the latter has willfully or by want of ordinary care brought the injury upon himself.

History: En. Sec. 2296, Civ. C. 1895; re-en. Sec. 5077, Rev. C. 1907; re-en. Sec. 7579, R.C.M. 1921; Cal. Civ. C. Sec. 1714; Based on Field Civ. C. Sec. 853; re-en. Sec. 7579, R.C.M. 1935; R.C.M. 1947, 58-607; amd. Sec. 9, Ch. 12, L. 1979.

27-1-702. Comparative negligence — extent to which contributory negligence bars recovery in action for damages. Contributory negligence shall not bar recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or injury to person or property if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

History: En. 58-607.1 by Sec. 1, Ch. 60, L. 1975; R.C.M. 1947, 58-607.1.

27-1-703. Multiple defendants jointly and severally liable — right of contribution. (1) Whenever the comparative negligence of the parties in any action is an issue and recovery is allowed against more than one party, each such party is jointly and severally liable for the amount awarded to the claimant but has the right of contribution from any other party against whom recovery is allowed. Contribution shall be proportional to the negligence of the parties against whom recovery is allowed.

(2) If for any reason all or part of the contribution from a party liable for contribution cannot be obtained, each of the other parties against whom recovery is allowed is liable to contribute a proportional part of the unpaid portion of the noncontributing party's share and may obtain judgment in a pending or subsequent action for contribution from the noncontributing party.

History: En. 58-607.2 by Sec. 1, Ch. 433, L. 1977; R.C.M. 1947, 58-607.2.

27-1-704 through 27-1-710 reserved.

27-1-711. Liability of minor or person of unsound mind for own torts — exemplary damages. A minor or person of unsound mind is civilly liable for a wrong done by him but is not liable in exemplary damages unless at the time of the act he was capable of knowing that it was wrongful.

History: En. Sec. 24, Civ. C. 1895; re-en. Sec. 3598, Rev. C. 1907; re-en. Sec. 5686, R.C.M. 1921; Cal. Civ. C. Sec. 41; re-en. Sec. 5686, R.C.M. 1935; R.C.M. 1947, 64-113.

27-1-712. Liability for damages for deceit. (1) One who willfully deceives another with intent to induce him to alter his position to his injury or risk is liable for any damage which he thereby suffers.

(2) A deceit, within the meaning of subsection (1), is either:

(a) the suggestion as a fact of that which is not true by one who does not believe it to be true;

(b) the assertion as a fact of that which is not true by one who has no reasonable ground for believing it to be true;

(c) the suppression of a fact by one who is bound to disclose it or who gives information of other facts which are likely to mislead for want of communication of that fact; or

(d) a promise made without any intention of performing it.

(3) One who practices a deceit with intent to defraud the public or a particular class of persons is deemed to have intended to defraud every individual in that class who is actually misled by the deceit.

History: (1)En. Sec. 2291, Civ. C. 1895; re-en. Sec. 5072, Rev. C. 1907; re-en. Sec. 7574, R.C.M. 1921; Cal. Civ. C. Sec. 1709; Field Civ. C. Sec. 848; re-en. Sec. 7574, R.C.M. 1935; Sec. 58-602, R.C.M. 1947; (2)En. Sec. 2292, Civ. C. 1895; re-en. Sec. 5073, Rev. C. 1907; re-en. Sec. 7575, R.C.M. 1921; Cal. Civ. C. Sec. 1710; Field Civ. C. Sec. 849; re-en. Sec. 7575, R.C.M. 1935; Sec. 58-603, R.C.M. 1947; (3)En. Sec. 2293, Civ. C. 1895; re-en. Sec. 5074, Rev. C. 1907; re-en. Sec. 7576, R.C.M. 1921; Cal. Civ. C. Sec. 1711; Field Civ. C. Sec. 850; re-en. Sec. 7576, R.C.M. 1935; Sec. 58-604, R.C.M. 1947; R.C.M. 1947, 58-602, 58-603, 58-604.

27-1-713. Duty to restore thing wrongfully acquired or retained. One who obtains a thing without the consent of its owner, by a consent afterwards rescinded, or by an unlawful exaction which the owner could not at the time prudently refuse must restore it to the person from whom it was thus obtained unless he has acquired a title thereto superior to that of such other person or unless the transaction was corrupt and unlawful on both sides. The restoration required by this section must be made without demand except where a thing is obtained by mutual mistake, in which case the party obtaining the thing is not bound to return it until he has notice of the mistake.

History: Ap. p. Sec. 2294, Civ. C. 1895; re-en. Sec. 5075, Rev. C. 1907; re-en. Sec. 7577, R.C.M. 1921; Cal. Civ. C. Sec. 1712; Field Civ. C. Sec. 851; re-en. Sec. 7577, R.C.M. 1935; Sec. 58-605, R.C.M. 1947; Ap. p. Sec. 2295, Civ. C. 1895; re-en. Sec. 5076, Rev. C. 1907; re-en. Sec. 7578, R.C.M. 1921; Cal. Civ. C. Sec. 1713; Field Civ. C. Sec. 852; re-en. Sec. 7578, R.C.M. 1935; Sec. 58-606, R.C.M. 1947; R.C.M. 1947, 58-605, 58-606.

27-1-714. Limits on liability for emergency care rendered at scene of accident or emergency. (1) Any person licensed as a physician and surgeon under the laws of the state of Montana or any other person who in good faith renders emergency care or assistance without compensation except as provided in subsection (2) at the scene of an emergency or accident is not liable for any civil damages for acts or omissions other than damages occasioned by gross negligence or by willful or wanton acts or omissions by such person in rendering such emergency care.

(2) Subsection (1) includes a person properly trained under the laws of this state who operates an ambulance to and from the scene of an emergency or renders emergency medical treatment on a volunteer basis so long as any reimbursement received for such volunteer services does not exceed 25% of his gross annual income.

History: En. Sec. 1, Ch. 93, L. 1963; R.C.M. 1947, 17-410; amd. Sec. 1, Ch. 390, L. 1979.

27-1-715. Liability of owner of vicious dog. (1) The owner of any dog which shall without provocation bite any person while such person is on or in a public place or lawfully on or in a private place, including the property of the owner of such dog, located within an incorporated city or town shall be liable for such damages as may be suffered by the person bitten regardless of the former viciousness of such dog or the owner's knowledge of such viciousness.

(2) A person is lawfully upon the private property of such owner within the meaning of this section when he is on such property in the performance of any duty imposed upon him by the laws of this state or by the laws or

postal regulations of the United States of America or when he is on such property as an invitee or licensee of the person lawfully in possession of the property.

History: **En. Sec. 1, Ch. 113, L. 1943; R.C.M. 1947, 17-409.**

Part 8

Libel and Slander

27-1-801. Defamation — how effected. Defamation is effected by:

(1) libel;

(2) slander.

History: **En. Sec. 31, Civ. C. 1895; re-en. Sec. 3601, Rev. C. 1907; re-en. Sec. 5689, R.C.M. 1921; Cal. Civ. C. Sec. 44; Field Civ. C. Sec. 28; re-en. Sec. 5689, R.C.M. 1935; R.C.M. 1947, 64-202.**

27-1-802. Libel defined. Libel is a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye which exposes any person to hatred, contempt, ridicule, or obloquy or which causes him to be shunned or avoided or which has a tendency to injure him in his occupation.

History: **En. Sec. 32, Civ. C. 1895; re-en. Sec. 3602, Rev. C. 1907; re-en. Sec. 5690, R.C.M. 1921; Cal. Civ. C. Sec. 45; Field Civ. C. 29; re-en. Sec. 5690, R.C.M. 1935; R.C.M. 1947, 64-203.**

27-1-803. Slander defined. Slander is a false and unprivileged publication other than libel which:

(1) charges any person with crime or with having been indicted, convicted, or punished for crime;

(2) imputes in him the present existence of an infectious, contagious, or loathsome disease;

(3) tends directly to injure him in respect to his office, profession, trade, or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profit;

(4) imputes to him impotence or want of chastity; or

(5) by natural consequence causes actual damage.

History: **En. Sec. 33, Civ. C. 1895; re-en. Sec. 3603, Rev. C. 1907; re-en. Sec. 5691, R.C.M. 1921; Cal. Civ. C. Sec. 46; Field Civ. C. Sec. 30; re-en. Sec. 5691, R.C.M. 1935; R.C.M. 1947, 64-204.**

27-1-804. What communications are privileged. A privileged publication is one made:

(1) in the proper discharge of an official duty;

(2) in any legislative or judicial proceeding or in any other official proceeding authorized by law;

(3) in a communication without malice to a person interested therein by one who is also interested or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent or who is requested by the person interested to give the information;

(4) by a fair and true report without malice of a judicial, legislative, or ther public official proceeding or of anything said in the course thereof.

History: En. Sec. 34, Civ. C. 1895; re-en. Sec. 3604, Rev. C. 1907; re-en. Sec. 5692, R.C.M. 1921; al. Civ. C. Sec. 47; Based on Field Civ. C. Sec. 31; re-en. Sec. 5692, R.C.M. 1935; R.C.M. 1947, 4-208.

27-1-805 through 27-1-810 reserved.

27-1-811. When owner of radio station not liable for material roadcast. No person, firm, or corporation owning or operating a radio roadcasting station is liable under the law of defamation on account of having made its broadcasting facilities available to any person, including but not mited to a candidate for public office, for discussion of controversial or ther subjects in the absence of proof of actual malice on the part of such wner or operator.

History: En. Sec. 1, Ch. 122, L. 1939; R.C.M. 1947, 64-205; amd. Sec. 10, Ch. 12, L. 1979.

27-1-812. Right of owner to require prior submission of text to e broadcast. Any person, firm, or corporation owning or operating a radio roadcasting station shall have the right but shall not be compelled to equire the submission and permanent filing in such station of a copy of the omplete address or other form of expression, if in words, intended to be roadcast over such station, not more than 48 hours before the time of the ntended broadcast thereof.

History: En. Sec. 2, Ch. 122, L. 1939; R.C.M. 1947, 64-206.

27-1-813. Liability of person broadcasting — liability of owner or broadcast prepared by station. Nothing in 27-1-811 or 27-1-812 may e construed to relieve any person broadcasting over a radio station from liaility under the law of defamation or to relieve any person, firm, or corporaon owning or operating a radio broadcasting station from liability under the aw of defamation on account of any broadcast prepared or made by such erson, firm, or corporation or by any officer or employee thereof in the ourse of his employment. Whenever such an owner or operator is liable on ccount of a broadcast and two or more broadcasting stations were connected multaneously or by transcription, film, metal tape, or other approved or dapted use for joint operation in the making of the broadcast, liability is mited solely to the person, firm, or corporation owning or operating the adio station which originated the broadcast.

History: En. Sec. 3, Ch. 122, L. 1939; R.C.M. 1947, 64-207; amd. Sec. 11, Ch. 12, L. 1979.

27-1-814. Repealed. Sec. 62, Ch. 12, L. 1979.

27-1-815. Repealed. Sec. 62, Ch. 12, L. 1979.

27-1-816. Repealed. Sec. 62, Ch. 12, L. 1979.

27-1-817. Repealed. Sec. 62, Ch. 12, L. 1979.

27-1-818. Media management to be given opportunity to publish correction prior to action for libel or slander. In order to claim punitive damages because of any defamatory publication in or broadcast on any newspaper, magazine, periodical, radio or television station, or cable television system, the defamed person shall first give those alleged to be responsible or liable for the publication or broadcast a reasonable opportunity to correct the defamatory matter. Such opportunity shall be given by notice in writing specifying the article or broadcast and the statements therein which are claimed to be false and defamatory and a statement of what are claimed to be the true facts. The notice may also state the sources, if any, from which the true facts may be ascertained with definiteness and certainty.

History: **En. Sec. 1, Ch. 569, L. 1979.**

27-1-819. What constitutes a reasonable time for correction. The first issue of a newspaper, magazine, or periodical published after the expiration of 1 week from the receipt of the notice provided for in 27-1-818 is within a reasonable time for correction. In the case of radio and television stations and cable television systems, a broadcast made at the same time of day as the broadcast complained of and of at least equal duration which is made within 7 days following receipt of such notice is within a reasonable time for correction.

History: **En. Sec. 2, Ch. 569, L. 1979.**

27-1-820. Content of correction. To the extent that the true facts are, with reasonable diligence, ascertainable with definiteness and certainty, only a retraction constitutes a correction; otherwise the publication or broadcast of the defamed person's statement of the true facts or so much thereof as is not defamatory of another, scurrilous, or otherwise improper for publication or broadcast, published or broadcast as his statement, constitutes a correction within the meaning of 27-1-818 through 27-1-821.

History: **En. Sec. 3, Ch. 569, L. 1979.**

27-1-821. Extent to which a correction is a defense upon trial. If it appears upon trial that the publication or broadcast complained of was made under honest mistake, then a correction timely published or broadcast without comment in a position and type as prominent as the alleged libel or in a broadcast made at the same time of day as the broadcast complained of and of at least equal duration constitutes a defense against the recovery of punitive damages.

History: **En. Sec. 4, Ch. 569, L. 1979.**

CHAPTER 2

STATUTES OF LIMITATIONS

Part 1 — General Provisions

Section

27-2-101. Definition of action.
27-2-102. When action commenced.
27-2-103. Actions by state subject to limitations.
27-2-104. Application of this state's statutes of limitations — actions against nonresidents.
27-2-105. Periods of limitation.

Part 2 — Time Limits on Specific Kinds of Actions

27-2-201. Actions upon judgments.
27-2-202. Actions based on contract or other obligation.
27-2-203. Actions for relief on ground of fraud or mistake.
27-2-204. Tort actions — general and personal injury.
27-2-205. Actions for medical malpractice.
27-2-206. Actions for legal malpractice.
27-2-207. Tort actions involving property.
27-2-208. Actions for damages arising out of work on improvements to real property.
27-2-209. Actions against local government or local government official.
27-2-210. Actions arising from the seizure or sale of property for taxes.
27-2-211. Actions to enforce penalty or forfeiture or other statutory liability.
27-2-212. Actions arising from wrongful removal or exclusion from office.
27-2-213. Actions against banks.
27-2-214. Actions for mesne profits of real property.
27-2-215. Other actions.

Part 3 — Accrual of Cause of Action

27-2-301. When demand necessary to perfect right to action.
27-2-302. Actions based on mutual accounts.
27-2-303. Actions for waste, trespass, or injury committed during mining work or exploration.
27-2-304. Actions involving personal property accruing after death and before issuance of letters of administration.

Part 4 — Circumstances Which Extend Period of Limitations

27-2-401. When person entitled to bring action is under a disability.
27-2-402. When defendant is out of state.
27-2-403. Actions involving aliens in time of war.
27-2-404. When a party dies before action commenced.
27-2-405. When controversy submitted to arbitration.
27-2-406. When action stayed by injunction or other order or statutory prohibition.
27-2-407. When action terminated or judgment reversed.
27-2-408. Effect on counterclaim of termination of action.
27-2-409. Acknowledgment of debt or part payment.

Part 1

General Provisions

27-2-101. Definition of action. The word "action", as used in this chapter, is to be construed, whenever it is necessary to do so, as including a special proceeding of a civil nature.

History: En. Sec. 559, C. Civ. Proc. 1895; re-en. Sec. 6476, Rev. C. 1907; re-en. Sec. 9066, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 363; re-en. Sec. 9066, R.C.M. 1935; R.C.M. 1947, 93-2720; amd. Sec. 12, Ch. 12, L. 1979.

27-2-102. When action commenced. For the purposes of statutes relating to the time within which an action must be commenced, an action is commenced when the complaint is filed.

History: En. Sec. 540, C. Civ. Proc. 1895; re-en. Sec. 6457, Rev. C. 1907; re-en. Sec. 9047, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 350; re-en. Sec. 9047, R.C.M. 1935; R.C.M. 1947, 93-2701; amd. Sec. 13, Ch. 12, L. 1979.

27-2-103. Actions by state subject to limitations. The limitations prescribed in part 2 of this chapter apply to actions brought in the name of the state or for the benefit of the state in the same manner as to actions by private parties.

History: En. Sec. 49, p. 50, L. 1877; re-en. Sec. 49, 1st Div. Rev. Stat. 1879; re-en. Sec. 49, 1st Div. Comp. Stat. 1887; re-en. Sec. 520, C. Civ. Proc. 1895; re-en. Sec. 6453, Rev. C. 1907; re-en. Sec. 9043, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 345; re-en. Sec. 9043, R.C.M. 1935; R.C.M. 1947, 93-2615; amd. Sec. 14, Ch. 12, L. 1979.

27-2-104. Application of this state's statutes of limitations — actions against nonresidents. Where a cause of action which does not involve the title to or possession of real property within the state accrues against a person who is not then a resident of the state, an action cannot be brought thereon in a court of the state against him or his personal representative after the expiration of the time limited by the laws of his residence for bringing a like action except by a resident of the state and in one of the following cases:

(1) where the cause of action originally accrued in favor of a resident of the state;

(2) where, before the expiration of the time so limited, the person in whose favor it originally accrued was or became a resident of the state or the cause of action was assigned to and thereafter continuously owned by a resident of the state.

History: En. Sec. 556, C. Civ. Proc. 1895; re-en. Sec. 6473, Rev. C. 1907; re-en. Sec. 9063, R.C.M. 1921; re-en. Sec. 9063, R.C.M. 1935; R.C.M. 1947, 93-2717.

27-2-105. Periods of limitation. All civil actions must be commenced within the periods prescribed in part 2 except when another statute specifically provides a different limitation.

History: En. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; R.C.M. 1947, 93-2601; amd. Sec. 15, Ch. 12, L. 1979.

Part 2

Time Limits on Specific Kinds of Actions

27-2-201. Actions upon judgments. (1) The period prescribed for the commencement of an action upon a judgment or decree of any court of record of the United States or of any state within the United States is within 10 years.

(2) The period prescribed for the commencement of an action upon a judgment or decree rendered in a court not of record is within 5 years. The cause of action is deemed, in such case, to have accrued when final judgment was rendered.

History: Ap. p. Sec. 1, p. 172, L. 1889; amd. Sec. 511, C. Civ. Proc. 1895; re-en. Sec. 6444, Rev. C. 1907; re-en. Sec. 9028; R.C.M. 1921; Cal. C. Civ. Proc. Sec. 336; re-en. Sec. 9028, R.C.M. 1935; Sec. 93-2602, R.C.M. 1947; Ap. p. Sec. 513, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 157, L. 1901; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6446, Rev. C. 1907; re-en. Sec. 9030, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 339; re-en. Sec. 9030, R.C.M. 1935; amd. Sec. 13, Ch. 263, L. 1975; Sec. 93-2604, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2602(1), 93-2604(2).

27-2-202. Actions based on contract or other obligation. (1) The period prescribed for the commencement of an action upon any contract, obligation, or liability founded upon an instrument in writing is within 8 years.

(2) The period prescribed for the commencement of an action upon a contract, account, or promise not founded on an instrument in writing is within 5 years.

(3) The period prescribed for the commencement of an action upon an obligation or liability, other than a contract, account, or promise, not founded upon an instrument in writing is within 3 years.

History: Ap. p. Sec. 1, p. 172, L. 1889; re-en. Sec. 512, C. Civ. Proc. 1895; re-en. Sec. 6445, Rev. C. 1907; re-en. Sec. 9029, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 337; re-en. Sec. 9029, R.C.M. 1935; Sec. 93-2603, R.C.M. 1947; Ap. p. Sec. 513, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 157, L. 1901; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6446, Rev. C. 1907; re-en. Sec. 9030, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 339; re-en. Sec. 9030, R.C.M. 1935; amd. Sec. 13, Ch. 263, L. 1975; Sec. 93-2604, R.C.M. 1947; Ap. p. Sec. 514, C. Civ. Proc. 1895; amd. Sec. 2, p. 157, L. 1901; amd. Sec. 2, Ch. 128, L. 1903; re-en. Sec. 6447, Rev. C. 1907; re-en. Sec. 9031, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 339; re-en. Sec. 9031, R.C.M. 1935; Sec. 93-2605, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2603, 93-2604(1), 93-2605(3); amd. Sec. 16, Ch. 12, L. 1979.

27-2-203. Actions for relief on ground of fraud or mistake. The period prescribed for the commencement of an action for relief on the ground of fraud or mistake is within 2 years, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.

History: Ap. p. Sec. 1, p. 50, L. 1893; re-en. Sec. 524, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6449, Rev. C. 1907; amd. Sec. 1, Ch. 47, L. 1917; amd. Sec. 1, Ch. 172, L. 1921; re-en. Sec. 9033, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 338; re-en. Sec. 9033, R.C.M. 1935; amd. Sec. 1, Ch. 423, L. 1975; Sec. 93-2607, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2607(4).

27-2-204. Tort actions — general and personal injury. (1) The period prescribed for the commencement of an action upon a liability not founded upon an instrument in writing is within 3 years.

(2) The period prescribed for the commencement of an action to recover damages for the death of one caused by the wrongful act or neglect of another is within 3 years.

(3) The period prescribed for the commencement of an action for libel, slander, assault, battery, false imprisonment, or seduction is within 2 years.

History: (1)En. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; (2)En. Sec. 514, C. Civ. Proc. 1895; amd. Sec. 2, p. 157, L. 1901; amd. Sec. 2, Ch. 128, L. 1903; re-en. Sec. 6447, Rev. C. 1907; re-en. Sec. 9031, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 339; re-en. Sec. 9031, R.C.M. 1935; Sec. 93-2605, R.C.M. 1947; (3)En. Sec. 515, C. Civ. Proc. 1895; re-en. Sec. 6448, Rev. C. 1907; re-en. Sec. 9032, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 340; re-en. Sec. 9032, R.C.M. 1935; Sec. 93-2606, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2605(2), (3), 93-2606(3); amd. Sec. 17, Ch. 12, L. 1979.

27-2-205. Actions for medical malpractice. Action for injury or death against a physician or surgeon, dentist, registered nurse, nursing home administrator, dispensing optician, optometrist, licensed physical therapist, podiatrist, psychologist, osteopath, chiropractor, clinical laboratory bioanalyst, clinical laboratory technologist, pharmacist, veterinarian, a licensed hospital or long-term care facility as the employer of any such person, based upon such person's alleged professional negligence or for rendering professional services without consent or for error or omission in such person's practice, shall be commenced within 3 years after the date of injury or 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the injury, whichever occurs last, but in no case may such action be commenced after 5 years from the date of injury. However, this time limitation shall be tolled for any period during which such person has failed to disclose any act, error, or omission upon which such action is based and which is known to him or through the use of reasonable diligence subsequent to said act, error, or omission would have been known to him.

History: En. Sec. 1, Ch. 328, L. 1971; amd. Sec. 1, Ch. 191, L. 1973; R.C.M. 1947, 93-2624.

27-2-206. Actions for legal malpractice. An action against an attorney licensed to practice law in Montana or a paralegal assistant or a legal intern employed by an attorney based upon the person's alleged professional negligent act or for error or omission in the person's practice must be commenced within 3 years after the plaintiff discovers or through the use of reasonable diligence should have discovered the act, error, or omission, whichever occurs last, but in no case may the action be commenced after 10 years from the date of the act, error, or omission.

History: En. 93-2625 by Sec. 1, Ch. 220, L. 1977; R.C.M. 1947, 93-2625.

27-2-207. Tort actions involving property. Within 2 years is the period prescribed for the commencement of an action for:

(1) injury to or waste or trespass on real or personal property;

(2) taking, detaining, or injuring any goods or chattels, including actions for the specific recovery of personal property;

(3) killing or injuring stock by a railroad corporation or company.

History: Ap. p. Sec. 1, p. 50, L. 1893; re-en. Sec. 524, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6449, Rev. C. 1907; amd. Sec. 1, Ch. 47, L. 1917; amd. Sec. 1, Ch. 172, L. 1921; re-en. Sec. 9033, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 338; re-en. Sec. 9033, R.C.M. 1935; amd. Sec. 1, Ch. 423, L. 1975; Sec. 93-2607, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2607(part).

27-2-208. Actions for damages arising out of work on improvements to real property. (1) Except as provided in subsections (2) and (3), no action to recover damages (other than an action upon any contract, obligation, or liability founded upon an instrument in writing) resulting from or arising out of the design, planning, supervision, inspection, construction, or observation of construction of or land surveying done in connection with any improvement to real property shall be commenced more than 10 years after completion of such improvement.

(2) Notwithstanding the provisions of subsection (1), an action for such damages for an injury which occurred during the 10th year after such completion may be commenced within 1 year after the occurrence of such injury.

(3) The limitation prescribed by this section shall not affect the responsibility of any owner, tenant, or person in actual possession and control of the improvement at the time a right of action arises.

(4) As used in this section, the term "completion" means that degree of completion at which the owner can utilize the improvement for the purpose for which it was intended or when a completion certificate is executed, whichever is earlier.

(5) Nothing in this section shall be construed as extending the period prescribed by the laws of this state for the bringing of any action.

History: En. Secs. 1, 2, 3, 4, 5, Ch. 60, L. 1971; R.C.M. 1947, 93-2619, 93-2620, 93-2621, 93-2622, 93-2623.

27-2-209. Actions against local government or local government official. (1) The period prescribed for the commencement of an action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and in virtue of his office or by the omission of an official duty, including the nonpayment of money collected upon an execution, is within 3 years; but this subsection does not apply for an action for an escape.

(2) The period prescribed for the commencement of an action against a sheriff or other officer for the escape of a prisoner arrested or imprisoned on civil process is within 1 year.

(3) Actions for claims against a county which have been rejected by the county commissioners must be commenced within 6 months after the first rejection thereof by such board.

(4) The period prescribed for the commencement of an action against a municipal corporation for damages or injuries to property caused by a mob or riot is within 1 year.

History: Ap. p. Sec. 514, C. Civ. Proc. 1895; amd. Sec. 2, p. 157, L. 1901; amd. Sec. 2, Ch. 128, L. 1903; re-en. Sec. 6447, Rev. C. 1907; re-en. Sec. 9031, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 339; re-en. Sec. 9031, R.C.M. 1935; Sec. 93-2605, R.C.M. 1947; Ap. p. Sec. 516, C. Civ. Proc. 1895; amd. Sec. 1, p. 144, L. 1899; re-en. Sec. 6450, Rev. C. 1907; amd. Sec. 2, Ch. 47, L. 1917; re-en. Sec. 9034, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 340; re-en. Sec. 9034, R.C.M. 1935; Sec. 93-2608, R.C.M. 1947; Ap. p. Sec. 517, C. Civ. Proc. 1895; amd. Sec. 1, p. 144, L. 1899; re-en. Sec. 6450a, Rev. C. 1907; re-en. Sec. 9035, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 341, 342; amd. Sec. 1, Ch. 27, L. 1933; re-en. Sec. 9035, R.C.M. 1935; Sec. 93-2609, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2605(1), 93-2608(part), 93-2609(2).

27-2-210. Actions arising from the seizure or sale of property for taxes. (1) Within 1 year is the period prescribed for the commencement of an action against an officer or officer de facto:

(a) to recover any goods, wares, merchandise, or other property seized by any such officer in his official capacity as tax collector;

(b) to recover the price or value of any goods, wares, merchandise, or other personal property so seized;

(c) for damages for the seizure, detention, or sale of or injury to any goods, wares, merchandise, or other personal property seized; or

(d) for damages done to any person or property in making any such seizure.

(2) The period prescribed for the commencement of an action to recover stock sold for a delinquent assessment is within 6 months.

History: Ap. p. Sec. 516, C. Civ. Proc. 1895; amd. Sec. 1, p. 144, L. 1899; re-en. Sec. 6450, Rev. C. 1907; amd. Sec. 2, Ch. 47, L. 1917; re-en. Sec. 9034, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 340; re-en. Sec. 9034, R.C.M. 1935; Sec. 93-2608, R.C.M. 1947; Ap. p. Sec. 517, C. Civ. Proc. 1895; amd.

Sec. 1, p. 144, L. 1899; re-en. Sec. 6450a, Rev. C. 1907; re-en. Sec. 9035, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 341, 342; amd. Sec. 1, Ch. 27, L. 1933; re-en. Sec. 9035, R.C.M. 1935; Sec. 93-2609, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2608(3), 93-2609(1).

27-2-211. Actions to enforce penalty or forfeiture or other statutory liability. (1) Within 2 years is the period prescribed for the commencement of an action upon:

(a) a statute for a penalty or forfeiture when the action is given to an individual or to an individual and the state, except when the statute imposing it prescribes a different limitation;

(b) a statute or an undertaking in a criminal action for a forfeiture or penalty to the state;

(c) a liability created by statute other than a penalty or forfeiture.

(2) The period prescribed for the commencement of an action by a municipal corporation for the violation of any city or town ordinance is within 1 year.

(3) Notwithstanding any other provision of this chapter, actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed or to enforce a liability created by law must be brought within 3 years after the discovery by the aggrieved party of the facts upon which the penalty of forfeiture attached or the liability was created.

History: Ap. p. Sec. 515, C. Civ. Proc. 1895; re-en. Sec. 6448, Rev. C. 1907; re-en. Sec. 9032, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 340; re-en. Sec. 9032, R.C.M. 1935; Sec. 93-2606, R.C.M. 1947; Ap. p. Sec. 1, p. 50, L. 1893; re-en. Sec. 524, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6449, Rev. C. 1907; amd. Sec. 1, Ch. 47, L. 1917; amd. Sec. 1, Ch. 172, L. 1921; re-en. Sec. 9033, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 338; re-en. Sec. 9033, R.C.M. 1935; amd. Sec. 1, Ch. 423, L. 1975; Sec. 93-2607, R.C.M. 1947; Ap. p. Sec. 516, C. Civ. Proc. 1895; amd. Sec. 1, p. 144, L. 1899; re-en. Sec. 6450, Rev. C. 1907; amd. Sec. 2, Ch. 47, L. 1917; re-en. Sec. 9034, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 340; re-en. Sec. 9034, R.C.M. 1935; Sec. 93-2608, R.C.M. 1947; Ap. p. Sec. 554, C. Civ. Proc. 1895; re-en. Sec. 6471, Rev. C. 1907; re-en. Sec. 9061, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 359; re-en. Sec. 9061, R.C.M. 1935; Sec. 93-2715, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2606(1), (2), 93-2607(1), 93-2608(part), 93-2715; amd. Sec. 18, Ch. 12, L. 1979.

27-2-212. Actions arising from wrongful removal or exclusion from office. Within 6 months is the period prescribed for the commencement of:

(1) any action for the restoration to office by any person wrongfully or illegally removed or excluded from office;

(2) any suit for the recovery of salary or other emoluments of office by any person having been wrongfully or illegally removed or excluded from office.

History: Ap. p. Sec. 517, C. Civ. Proc. 1895; amd. Sec. 1, p. 144, L. 1899; re-en. Sec. 6450a, Rev. C. 1907; re-en. Sec. 9035, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 341, 342; amd. Sec. 1, Ch. 27, L. 1933; re-en. Sec. 9035, R.C.M. 1935; Sec. 93-2609, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2609(3), (4).

27-2-213. Actions against banks. (1) Except as provided in subsection (2), there are no time limitations on the commencement of actions to recover money or other property deposited with any bank, banker, trust company, or savings and loan corporation, association, or society.

(2) Any action to obtain, set aside, or question in any manner any stated or settled account between any bank, banker, trust company, or savings and loan corporation, association, or society and any depositor with such bank, banker, trust company, or savings and loan corporation, association, or society must be commenced within 5 years from the date of the statement of such account. Any action based upon or arising from the payment by any bank, banker, trust company, or savings and loan corporation, association, or society of a forged, raised, or otherwise altered check, order, or promissory note out of the deposit, money, or property of the plaintiff must be commenced within 3 years from the day on which the plaintiff or his agent, assignee, or personal representative was notified of such payment or received such check, order, or note marked "paid".

History: En. Sec. 523, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 78, L. 1905; re-en. Sec. 6456, Rev. C. 1907; re-en. Sec. 9046, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 348; re-en. Sec. 9046, R.C.M. 1935; R.C.M. 1947, 93-2618; amd. Sec. 19, Ch. 12, L. 1979.

27-2-214. Actions for mesne profits of real property. The period prescribed for the commencement of an action for mesne profits of real property is within 10 years.

History: Ap. p. Sec. 1, p. 172, L. 1889; amd. Sec. 511, C. Civ. Proc. 1895; re-en. Sec. 6444, Rev. C. 1907; re-en. Sec. 9028; R.C.M. 1921; Cal. C. Civ. Proc. Sec. 336; re-en. Sec. 9028, R.C.M. 1935; Sec. 93-2602, R.C.M. 1947; Ap. p. Sec. 510, C. Civ. Proc. 1895; re-en. Sec. 6443, Rev. C. 1907; re-en. Sec. 9027, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 335; re-en. Sec. 9027, R.C.M. 1935; Sec. 93-2601, R.C.M. 1947; R.C.M. 1947, 93-2601(part), 93-2602(2).

27-2-215. Other actions. An action for relief not otherwise provided for must be commenced within 5 years after the cause of action accrues.

History: En. Sec. 518, C. Civ. Proc. 1895; re-en. Sec. 6451, Rev. C. 1907; re-en. Sec. 9041, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 343; re-en. Sec. 9041, R.C.M. 1935; R.C.M. 1947, 93-2613; amd. Sec. 20, Ch. 12, L. 1979.

Part 3

Accrual of Cause of Action

27-2-301. When demand necessary to perfect right to action. Where a right exists but a demand is necessary to entitle a person to maintain an action, the time within which the action must be commenced must be computed from the time when the right to make the demand is complete except in one of the following cases:

(1) Where the right grows out of the receipt or detention of money or property by an agent, trustee, attorney, or other person acting in a fiduciary capacity, the time must be computed from the time when the person having the right to make the demand has actual knowledge of the facts upon which that right depends.

(2) Where there was a deposit of money not to be paid at a fixed time but only upon a special demand or a delivery of personal property not to be returned, specifically or in kind, at a fixed time or upon a fixed contingency, the time must be computed from the demand.

History: En. Sec. 551, C. Civ. Proc. 1895; re-en. Sec. 6468, Rev. C. 1907; re-en. Sec. 9058, R.C.M. 1921; re-en. Sec. 9058, R.C.M. 1935; R.C.M. 1947, 93-2712.

27-2-302. Actions based on mutual accounts. In an action brought to recover a balance due upon a mutual, open, and current account where there have been reciprocal demands between the parties, the cause of action is deemed to have accrued from the time of the last item proved in the account on either side.

History: En. Sec. 48, p. 50, L. 1877; re-en. Sec. 48, 1st Div. Rev. Stat. 1879; re-en. Sec. 48, 1st Div. Comp. Stat. 1887; re-en. Sec. 519, C. Civ. Proc. 1895; re-en. Sec. 6452, Rev. C. 1907; re-en. Sec. 9042, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 344; re-en. Sec. 9042, R.C.M. 1935; R.C.M. 1947, 93-2614.

27-2-303. Actions for waste, trespass, or injury committed during mining work or exploration. When waste, trespass, or injury is committed by reason of underground work upon any mining claim or seismic exploration, location, spacing, drilling, equipping, producing, or other operation related to exploration or production of oil, gas, water, geothermal resources, or other minerals, the cause of action is not considered to have accrued until the discovery by the aggrieved party of the facts constituting such waste, trespass, or injury.

History: En. Sec. 1, p. 50, L. 1893; re-en. Sec. 524, C. Civ. Proc. 1895; amd. Sec. 1, Ch. 128, L. 1903; re-en. Sec. 6449, Rev. C. 1907; amd. Sec. 1, Ch. 47, L. 1917; amd. Sec. 1, Ch. 172, L. 1921; re-en. Sec. 9033, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 338; re-en. Sec. 9033, R.C.M. 1935; amd. Sec. 1, Ch. 423, L. 1975; R.C.M. 1947, 93-2607(part); amd. Sec. 21, Ch. 12, L. 1979.

27-2-304. Actions involving personal property accruing after death and before issuance of letters of administration. The time within which an action must be commenced by an executor or administrator to recover personal property taken after the death of a testator or intestate and before the issuing of letters of administration or to recover damages for taking, detaining, or injuring personal property within the same period shall be computed from:

(1) the time of issuing such letters if they are issued within 5 years of the death;

(2) 5 years after the death if the letters have not then been issued.

History: En. Sec. 545, C. Civ. Proc. 1895; re-en. Sec. 6462, Rev. C. 1907; re-en. Sec. 9052, R.C.M. 1921; re-en. Sec. 9052, R.C.M. 1935; R.C.M. 1947, 93-2706(part); amd. Sec. 22, Ch. 12, L. 1979.

Part 4

Circumstances Which Extend Period of Limitations

27-2-401. When person entitled to bring action is under a disability. (1) If a person entitled to bring an action mentioned in part 2, except 27-2-211(3), is, at the time the cause of action accrues, either a minor, seriously mentally ill, or imprisoned on a criminal charge or under a sentence for a term less than for life, the time of such disability is not a part of the time limited for commencing the action. However, the time so limited cannot be extended more than 5 years by any such disability except minority or, in any case, more than 1 year after the disability ceases.

(2) If an action is barred by 27-2-304, any of the heirs, devisees, or creditors who at the time of the transaction upon which the action might have been founded was under one of the disabilities mentioned in subsection (1)

may, within 5 years after the cessation of such disability, maintain an action to recover damages. In such action he may recover such sum or the value of such property as he would have received upon the final distribution of the estate if an action had been seasonably commenced by the executor or administrator.

(3) No person may avail himself of a disability unless it existed when his right of action or entry accrued.

(4) When two or more disabilities coexist at the time the right of action or entry accrues, the limitation does not attach until they are both removed.

History: (1)En. Sec. 14, p. 468, Bannack Stat.; re-en. Sec. 12, p. 517, Cod. Stat. 1871; repealed Sec. 674, p. 215, L. 1877; re-en. Sec. 542, C. Civ. Proc. 1895; re-en. Sec. 6459, Rev. C. 1907; re-en. Sec. 9049, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 352; re-en. Sec. 9049, R.C.M. 1935; amd. Sec. 2, Ch. 220, L. 1977; Sec. 93-2703, R.C.M. 1947; (2)En. Sec. 545, C. Civ. Proc. 1895; re-en. Sec. 6462, Rev. C. 1907; re-en. Sec. 9052, R.C.M. 1921; re-en. Sec. 9052, R.C.M. 1935; Sec. 93-2706, R.C.M. 1947; (3)En. Sec. 19, p. 469, Bannack Stat.; re-en. Sec. 17, p. 518, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 549, C. Civ. Proc. 1895; re-en. Sec. 6466, Rev. C. 1907; re-en. Sec. 9056, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 357; re-en. Sec. 9056, R.C.M. 1935; Sec. 93-2710, R.C.M. 1947; (4)En. Sec. 20, p. 469, Bannack Stat.; re-en. Sec. 18, p. 518, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 550, C. Civ. Proc. 1895; re-en. Sec. 6467, Rev. C. 1907; re-en. Sec. 9057, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 358; re-en. Sec. 9057, R.C.M. 1935; Sec. 93-2711, R.C.M. 1947; R.C.M. 1947, 93-2703, 93-2706(part), 93-2710, 93-2711; amd. Sec. 23, Ch. 12, L. 1979.

27-2-402. When defendant is out of state. If when the cause of action accrues against a person he is out of the state, the action may be commenced within the term herein limited after his return to the state; and if after the cause of action accrues he departs from the state, the time of his absence is not part of the time limited for the commencement of the action.

History: En. Sec. 13, p. 468, Bannack Stat.; re-en. Sec. 11, p. 517, Cod. Stat. 1871; re-en. Sec. 60, p. 50, L. 1877; re-en. Sec. 50, 1st Div. Rev. Stat. 1879; re-en. Sec. 50, 1st Div. Comp. Stat. 1887; re-en. Sec. 541, C. Civ. Proc. 1895; re-en. Sec. 6458, Rev. C. 1907; re-en. Sec. 9048, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 351; re-en. Sec. 9048, R.C.M. 1935; R.C.M. 1947, 93-2702.

27-2-403. Actions involving aliens in time of war. When a person s an alien subject or a citizen of a country at war with the United States, he time of the continuance of the war is not part of the period limited for he commencement of the action.

History: En. Sec. 16, p. 469, Bannack Stat.; re-en. Sec. 14, p. 517, Cod. Stat. 1871; rep. Sec. 674, . 215, L. 1877; re-en. Sec. 546, C. Civ. Proc. 1895; re-en. Sec. 6463, Rev. C. 1907; re-en. Sec. 9053, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 354; re-en. Sec. 9053, R.C.M. 1935; R.C.M. 1947, 93-2707.

27-2-404. When a party dies before action commenced. (1) If a person entitled to bring an action dies before the expiration of the time imited for the commencement thereof and the cause of action survives, an action may be commenced by his representatives after the expiration of that ime and within 1 year from his death.

(2) If a person against whom an action may be brought dies before the xpiration of the time limited for the commencement thereof and the cause of action survives, an action may be commenced against his representatives after the expiration of that time and within 1 year after the issuing of letters estamentary or of administration. If a person against whom a cause of action xists dies without the state, the time which elapses between his death and he expiration of 1 year after the issuing within the state of letters testamenary or letters of administration is not a part of the time limited for the commencement of an action therefor against his executor or administrator.

History: Ap. p. Sec. 15, p. 468, Bannack Stat.; re-en. Sec. 13, p. 517, Cod. Stat. 1871; repealed Sec. 674, p. 215, L. 1877; re-en. Sec. 543, C. Civ. Proc. 1895; re-en. Sec. 6460, Rev. C. 1907; re-en.

Sec. 9050, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 353; re-en. Sec. 9050, R.C.M. 1935; Sec. 93-2704, R.C.M. 1947; Ap. p. Sec. 544, C. Civ. Proc. 1895; re-en. Sec. 6461, Rev. C. 1907; re-en. Sec. 9051, R.C.M. 1921; re-en. Sec. 9051, R.C.M. 1935; Sec. 93-2705, R.C.M. 1947; R.C.M. 1947, 93-2704, 93-2705.

27-2-405. When controversy submitted to arbitration. Where the persons who might be adverse parties in an action have entered into a written agreement to submit to arbitration or to refer the cause of action or a controversy in which it might be available or have entered into a written submission thereof to arbitrators and, before an award or other determination thereupon, the agreement or submission is revoked, so as to render it ineffectual, by the death of either party thereto or by the act of the person against whom the action might have been brought or the execution thereof or the remedy upon an award or other determination thereunder is stayed by injunction or other order procured by him from a competent court or judge, the time which has elapsed between the entering into the written submission or agreement and the revocation thereof or the expiration of the stay is not a part of the time limited for the commencement of the action.

History: En. Sec. 552, C. Civ. Proc. 1895; re-en. Sec. 6469, Rev. C. 1907; re-en. Sec. 9059, R.C.M. 1921; re-en. Sec. 9059, R.C.M. 1935; R.C.M. 1947, 93-2713.

27-2-406. When action stayed by injunction or other order or statutory prohibition. When the commencement of an action is stayed by injunction or other order of the court or judge or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action.

History: En. Sec. 18, p. 469, Bannack Stat.; re-en. Sec. 16, p. 518, Cod. Stat. 1871; re-en. Sec. 52, p. 50, L. 1877; re-en. Sec. 52, 1st Div. Rev. Stat. 1879; re-en. Sec. 52, 1st Div. Comp. Stat. 1887; amd. Sec. 548, C. Civ. Proc. 1895; re-en. Sec. 6465, Rev. C. 1907; re-en. Sec. 9055, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 356; re-en. Sec. 9055, R.C.M. 1935; R.C.M. 1947, 93-2709.

27-2-407. When action terminated or judgment reversed. If an action is commenced within the time limited therefor and a judgment therein is reversed on appeal without awarding a new trial or the action is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff or, if he dies and the cause of action survives, his representative may commence a new action for the same cause after the expiration of the time so limited and within 1 year after such a reversal or termination.

History: En. Sec. 17, p. 469, Bannack Stat.; re-en. Sec. 15, p. 518, Cod. Stat. 1871; re-en. Sec. 51, p. 50, L. 1877; re-en. Sec. 51, 1st Div. Rev. Stat. 1879; re-en. Sec. 51, 1st Div. Comp. Stat. 1887; amd. Sec. 547, C. Civ. Proc. 1895; re-en. Sec. 6464, Rev. C. 1907; re-en. Sec. 9054, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 355; re-en. Sec. 9054, R.C.M. 1935; R.C.M. 1947, 93-2708.

27-2-408. Effect on counterclaim of termination of action. Whenever a defendant in an action has interposed an answer in support of which he would be entitled to rely at the trial upon a defense or counterclaim then existing in his favor the remedy upon which, at the time of the commencement of the action, was not barred by any provision of this code and the complaint is dismissed or the action is discontinued or abates because of the plaintiff's death, the time between the commencement and the ermination of the action is not a part of the time limited for the commencement of an action by the defendant to recover for the cause of action so nterposed as a defense or to interpose the same defense in another action brought by the same plaintiff or a person deriving title from or under him.

History: En. Sec. 553, C. Civ. Proc. 1895; re-en. Sec. 6470, Rev. C. 1907; re-en. Sec. 9060, R.C.M. 921; re-en. Sec. 9060, R.C.M. 1935; R.C.M. 1947, 93-2714; amd. Sec. 24, Ch. 12, L. 1979.

27-2-409. Acknowledgment of debt or part payment. No acknowledgment or promise is evidence of a new or continuing contract sufficient to cause the relevant statute of limitations to begin running anew unless the same is contained in some writing signed by the party to be charged thereby. However, this section does not alter the effect of any payment of principal or interest, which payment is equivalent to a new promise in writing, duly signed, to pay the residue of the debt.

History: En. Sec. 21, p. 469, Bannack Stat.; re-en. Sec. 19, p. 518, Cod. Stat. 1871; re-en. Sec. 53, p. 50, L. 1877; re-en. Sec. 53, 1st Div. Rev. Stat. 1879; re-en. Sec. 53, 1st Div. Comp. Stat. 1887; amd. Sec. 555, C. Civ. Proc. 1895; re-en. Sec. 6472, Rev. C. 1907; re-en. Sec. 9062, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 360; re-en. Sec. 9062, R.C.M. 1935; R.C.M. 1947, 93-2716; amd. Sec. 25, Ch. 12, L. 1979.

CHAPTERS 3 AND 4

RESERVED

CHAPTER 5

ARBITRATION

Part 1 — Submission to Arbitration, Revocation

Section
27-5-101. Kinds of controversies that may be submitted to arbitration.
27-5-102. Form of submission to arbitration.
27-5-103. Entry of submission as court order.
27-5-104. Effect of entry — revocation.
27-5-105. What may be recovered in action for revocation.

Part 2 — Action by Arbitrators

27-5-201. Oath of arbitrators.
27-5-202. Powers and duties of arbitrators.
27-5-203. Form of award — filing and delivery.

Part 3 — Procedure Following Award

27-5-301. When court may vacate award.
27-5-302. When court may modify or correct award.
27-5-303. When award has effect of a judgment.
27-5-304. Right to appeal.

Part 1

Submission to Arbitration, Revocation

27-5-101. Kinds of controversies that may be submitted to arbitration. Persons capable of contracting may submit to arbitration any controversy which might be the subject of a civil action between them except a question of title to real property in fee or for life. This qualification does not include questions relating merely to the partition or boundaries of real property.

History: En. Sec. 302, p. 106, Bannack Stat.; re-en. Sec. 358, p. 207, L. 1867; re-en. Sec. 432, p. 122, Cod. Stat. 1871; re-en. Sec. 459, p. 163, L. 1877; re-en. Sec. 459, 1st Div. Rev. Stat. 1879; re-en. Sec. 472, 1st Div. Comp. Stat. 1887; re-en. Sec. 2270, C. Civ. Proc. 1895; re-en. Sec. 7365, Rev. C. 1907; re-en. Sec. 9972, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1281; re-en. Sec. 9972, R.C.M. 1935; R.C.M. 1947, 93-201-1.

27-5-102. Form of submission to arbitration. The submission to arbitration must be in writing and may be to one or more persons.

History: En. Sec. 303, p. 106, Bannack Stat.; re-en. Sec. 359, p. 207, L. 1867; re-en. Sec. 433, p. 122, Cod. Stat. 1871; re-en. Sec. 460, p. 163, L. 1877; re-en. Sec. 460, 1st Div. Rev. Stat. 1879; re-en. Sec. 473, 1st Div. Comp. Stat. 1887; re-en. Sec. 2271, C. Civ. Proc. 1895; re-en. Sec. 7366, Rev. C. 1907; re-en. Sec. 9973, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1282; re-en. Sec. 9973, R.C.M. 1935; R.C.M. 1947, 93-201-2.

27-5-103. Entry of submission as court order. It may be stipulated in the submission that it be entered as an order of the district court, for which purpose it must be filed with the clerk of the district court of the county where the parties or one of them resides. The clerk must thereupon enter in his register of actions a note of the submission, with the names of the parties, the names of the arbitrators, the date of the submission, when filed, and the time limited by the submission, if any, within which the award must be made.

History: En. Sec. 304, p. 107, Bannack Stat.; re-en. Sec. 360, p. 207, L. 1867; re-en. Sec. 434, p. 122, Cod. Stat. 1871; re-en. Sec. 461, p. 163, L. 1877; re-en. Sec. 461, 1st Div. Rev. Stat. 1879; re-en. Sec. 474, 1st Div. Comp. Stat. 1887; re-en. Sec. 2272, C. Civ. Proc. 1895; re-en. Sec. 7367, Rev. C. 1907; re-en. Sec. 9974, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1283; re-en. Sec. 9974, R.C.M. 1935; R.C.M. 1947, 93-201-3(part).

27-5-104. Effect of entry — revocation. When so entered, the submission cannot be revoked without the consent of both parties. The arbitrators may be compelled by the court or judge to make an award, and the award may be enforced by the court or judge in the same manner as a judgment. If the submission be not made an order of the court, it may be revoked at any time before the award is made.

History: En. Sec. 304, p. 107, Bannack Stat.; re-en. Sec. 360, p. 207, L. 1867; re-en. Sec. 434, p. 122, Cod. Stat. 1871; re-en. Sec. 461, p. 163, L. 1877; re-en. Sec. 461, 1st Div. Rev. Stat. 1879; re-en. Sec. 474, 1st Div. Comp. Stat. 1887; re-en. Sec. 2272, C. Civ. Proc. 1895; re-en. Sec. 7367, Rev. C. 1907; re-en. Sec. 9974, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1283; re-en. Sec. 9974, R.C.M. 1935; R.C.M. 1947, 93-201-3(part).

27-5-105. What may be recovered in action for revocation. If a submission to arbitration be revoked and an action be brought therefor, the amount to be recovered can only be the costs and damages sustained in preparing for and attending the arbitration.

History: En. Sec. 311, p. 109, Bannack Stat.; re-en. Sec. 367, p. 209, L. 1867; re-en. Sec. 441, p. 123, Cod. Stat. 1871; re-en. Sec. 468, p. 165, L. 1877; re-en. Sec. 468, 1st Div. Rev. Stat. 1879;

e-en. Sec. 481, 1st Div. Comp. Stat. 1887; re-en. Sec. 2279, C. Civ. Proc. 1895; re-en. Sec. 7374, Rev. . 1907; re-en. Sec. 9981, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1290; re-en. Sec. 9981, R.C.M. 1935; .C.M. 1947, 93-201-10.

Part 2

Action by Arbitrators

27-5-201. Oath of arbitrators. Before acting, the arbitrators must be worn before an officer authorized to administer oaths, faithfully and fairly o hear and examine the allegations and evidence of the parties in relation o the matters in controversy and to make a just award according to their nderstanding.

History: En. Sec. 306, p. 107, Bannack Stat.; re-en. Sec. 362, p. 208, L. 1867; re-en. Sec. 436, . 122, Cod. Stat. 1871; re-en. Sec. 463, p. 164, L. 1877; re-en. Sec. 463, 1st Div. Rev. Stat. 1879; e-en. Sec. 476, 1st Div. Comp. Stat. 1887; re-en. Sec. 2274, C. Civ. Proc. 1895; re-en. Sec. 7369, Rev. . 1907; re-en. Sec. 9976, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1285; re-en. Sec. 9976, R.C.M. 1935; .C.M. 1947, 93-201-5(part).

27-5-202. Powers and duties of arbitrators. Arbitrators have ower to appoint a time and place for hearing, to adjourn from time to time, o administer oaths to witnesses, to hear the allegations and evidence of the arties, and to make an award thereon. All the arbitrators must meet and act ogether during the investigation, but when met, a majority may determine ny question.

History: Ap. p. Sec. 305, p. 107, Bannack Stat.; re-en. Sec. 361, p. 208, L. 1867; re-en. Sec. 435, . 122, Cod. Stat. 1871; re-en. Sec. 462, p. 164, L. 1877; re-en. Sec. 462, 1st Div. Rev. Stat. 1879; -en. Sec. 475, 1st Div. Comp. Stat. 1887; re-en. Sec. 2273, C. Civ. Proc. 1895; re-en. Sec. 7368, Rev. . 1907; re-en. Sec. 9975, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1284; re-en. Sec. 9975, R.C.M. 1935; ec. 93-201-4, R.C.M. 1947; Ap. p Sec. 306, p. 107, Bannack Stat.; re-en. Sec. 362, p. 208, L. 1867; -en. Sec. 436, p. 122, Cod. Stat. 1871; re-en. Sec. 463, p. 164, L. 1877; re-en. Sec. 463, 1st Div. ev. Stat. 1879; re-en. Sec. 476, 1st Div. Comp. Stat. 1887; re-en. Sec. 2274, C. Civ. Proc. 1895; re-en. ec. 7369, Rev. C. 1907; re-en. Sec. 9976, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1285; re-en. Sec. 9976, .C.M. 1935; Sec. 93-201-5, R.C.M. 1947; R.C.M. 1947, 93-201-4, 93-201-5(part).

27-5-203. Form of award — filing and delivery. The award must e in writing, signed by the arbitrators or a majority of them, and delivered o the parties. When the submission is made an order of the court, the award ust be filed with the clerk and a note thereof made in his register.

History: En. Sec. 307, p. 108, Bannack Stat.; re-en. Sec. 363, p. 208, L. 1867; re-en. Sec. 437, 123, Cod. Stat. 1871; re-en. Sec. 464, p. 164, L. 1877; re-en. Sec. 464, 1st Div. Rev. Stat. 1879; -en. Sec. 477, 1st Div. Comp. Stat. 1887; re-en. Sec. 2275, C. Civ. Proc. 1895; re-en. Sec. 7370, Rev. . 1907; re-en. Sec. 9977, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1286; re-en. Sec. 9977, R.C.M. 1935; .C.M. 1947, 93-201-6(part).

Part 3

Procedure Following Award

27-5-301. When court may vacate award. The court or judge, on otion, may vacate the award upon any of the following grounds and may rder a new hearing before the same arbitrators or not, in its or his discre- on:

(1) It was procured by corruption or fraud.

(2) The arbitrators were guilty of misconduct or committed gross error in refusing, on cause shown, to postpone the hearing or in refusing to hear pertinent evidence or otherwise acted improperly in a manner by which the rights of the party were prejudiced.

(3) The arbitrators exceeded their powers in making the award, or they refused or improperly omitted to consider a part of the matters submitted to them.

(4) The award is indefinite or cannot be performed.

History: En. Sec. 308, p. 108, Bannack Stat.; re-en. Sec. 364, p. 208, L. 1867; re-en. Sec. 438 p. 123, Cod. Stat. 1871; re-en. Sec. 465, p. 165, L. 1877; re-en. Sec. 465, 1st Div. Rev. Stat. 1879 re-en. Sec. 478, 1st Div. Comp. Stat. 1887; re-en. Sec. 2276, C. Civ. Proc. 1895; re-en. Sec. 7371, Rev C. 1907; re-en. Sec. 9978, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1287; re-en. Sec. 9978, R.C.M. 1935 R.C.M. 1947, 93-201-7.

27-5-302. When court may modify or correct award. The court or judge may, on motion, modify or correct the award where it appears that:

(1) there was a miscalculation in figures upon which it was made or that there is a mistake in the description of some persons or property therein;

(2) a part of the award is upon matters not submitted, which part can be separated from other parts and does not affect the decision on the matters submitted;

(3) the award, though imperfect in form, could have been amended if it had been a verdict, or the imperfection disregarded.

History: En. Sec. 309, p. 108, Bannack Stat.; re-en. Sec. 365, p. 209, L. 1867; re-en. Sec. 439 p. 123, Cod. Stat. 1871; re-en. Sec. 466, p. 165, L. 1877; re-en. Sec. 466, 1st Div. Rev. Stat. 1879 re-en. Sec. 479, 1st Div. Comp. Stat. 1887; re-en. Sec. 2277, C. Civ. Proc. 1895; re-en. Sec. 7372, Rev C. 1907; re-en. Sec. 9979, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1288; re-en. Sec. 9979, R.C.M. 1935 R.C.M. 1947, 93-201-8.

27-5-303. When award has effect of a judgment. After the expiration of 5 days from the filing of the award, upon the application of a party who also files an affidavit showing that notice of filing the award has been served on the adverse party or his attorney at least 4 days prior to such application and that no order staying the entry of judgment has been served the clerk must enter the award in the judgment book and thereupon it has the effect of a judgment.

History: En. Sec. 307, p. 108, Bannack Stat.; re-en. Sec. 363, p. 208, L. 1867; re-en. Sec. 437 p. 123, Cod. Stat. 1871; re-en. Sec. 464, p. 164, L. 1877; re-en. Sec. 464, 1st Div. Rev. Stat. 1879 re-en. Sec. 477, 1st Div. Comp. Stat. 1887; re-en. Sec. 2275, C. Civ. Proc. 1895; re-en. Sec. 7370, Rev C. 1907; re-en. Sec. 9977, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1286; re-en. Sec. 9977, R.C.M. 1935 R.C.M. 1947, 93-201-6(part); amd. Sec. 26, Ch. 12, L. 1979.

27-5-304. Right to appeal. The decision upon the motion provided for in 27-5-301 or 27-5-302 is subject to appeal in the same manner as an order which is subject to appeal in a civil action, but the judgment entered before motion made cannot be subject to appeal.

History: En. Sec. 310, p. 109, Bannack Stat.; re-en. Sec. 366, p. 209, L. 1867; re-en. Sec. 440 p. 123, Cod. Stat. 1871; re-en. Sec. 467, p. 165, L. 1877; re-en. Sec. 467, 1st Div. Rev. Stat. 1879 re-en. Sec. 480, 1st Div. Comp. Stat. 1887; re-en. Sec. 2278, C. Civ. Proc. 1895; re-en. Sec. 7373, Rev C. 1907; re-en. Sec. 9980, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1289; re-en. Sec. 9980, R.C.M. 1935 R.C.M. 1947, 93-201-9.

CHAPTER 6

MONTANA MEDICAL MALPRACTICE PANEL ACT

Part 1 — General Provisions

Section
27-6-101. Short title.
27-6-102. Purpose.
27-6-103. Definitions.
27-6-104. Creation of panel.
27-6-105. What claims panel to review.
27-6-106. Immunity of panel members and witnesses from civil liability.

Part 2 — Administration of Act

27-6-201. Appointment, term, and salary of director.
27-6-202. Employment of staff and maintenance of offices.
27-6-203. Compensation of panel and staff.
27-6-204. Authority to adopt rules.
27-6-205. Powers of panel.
27-6-206. Funding.

Part 3 — Preliminary Procedure

27-6-301. How cases submitted.
27-6-302. Contents of application — waiver of confidentiality of medical records.
27-6-303. Amendments to application.
27-6-304. Copies of application to professional societies when vicarious liability claimed.
27-6-305. Service on health care provider.
27-6-306. Health care provider's appearance and answer — waiver of confidentiality of records.
27-6-307. Assistance to defendant in obtaining expert consultation.
27-6-308. Director to furnish panel members with documents.

Part 4 — Formation and Composition of Panel

27-6-401. Composition of panel.
27-6-402. Selection of panelists.
27-6-403. Panel in cases involving multiple defendants.
27-6-404. Disqualification of panel member.

Part 5 — Hearing Procedure

27-6-501. Time and place of hearing.
27-6-502. Conduct of hearing.
27-6-503. Conclusion of hearing — supplemental hearing.

Part 6 — Deliberations and Decision of Panel

27-6-601. Selection of chairman.
27-6-602. Questions panel must decide.
27-6-603. Deliberations to be secret — voting.
27-6-604. Form and content of decision.
27-6-605. Decision to be filed and copies sent to parties, attorneys, and licensing board.
27-6-606. Decision not binding — settlement agreements.

Part 7 — Effect of Proceedings in Court Action—Confidentiality

27-6-701. No court action before application to and decision by panel.

27-6-702. Tolling of statute of limitations.
27-6-703. Records of proceedings — confidentiality.
27-6-704. Panel proceedings and decision privileged from disclosure in court actions.

Part 1

General Provisions

27-6-101. Short title. This chapter may be cited as the "Montana Medical Malpractice Panel Act".

History: **En. 17-1301 by Sec. 1, Ch. 449, L. 1977; R.C.M. 1947, 17-1301.**

Compiler's Comments

Saving clause. Sec. 16, Ch. 449, L. 1977, provided: "This act does not apply to acts of malpractice occurring prior to its effective date."

27-6-102. Purpose. The purpose of this chapter is to prevent where possible the filing in court of actions against health care providers and their employees for professional liability in situations where the facts do not permit at least a reasonable inference of malpractice and to make possible the fair and equitable disposition of such claims against health care providers as are or reasonably may be well founded.

History: **En. 17-1302 by Sec. 2, Ch. 449, L. 1977; R.C.M. 1947, 17-1302.**

27-6-103. Definitions. As used in this chapter, the following definitions apply:

(1) "Health care provider" means a physician licensed to practice medicine in Montana or a hospital, hospital-related facility, or long-term care facility.

(2) "Malpractice claim" means any claim or potential claim against a health care provider for medical treatment, lack of medical treatment, or other alleged departure from accepted standards of health care which proximately results in damage to the patient, whether the patient's claim or potential claim sounds in tort or contract, and includes but is not limited to allegations of battery or wrongful death.

(3) "Panel" means the Montana medical malpractice panel provided for in 27-6-104.

History: **En. 17-1303 by Sec. 3, Ch. 449, L. 1977; R.C.M. 1947, 17-1303.**

27-6-104. Creation of panel. The Montana medical malpractice panel is created. The panel is attached to the Montana supreme court for administrative purposes only, except that 2-15-121(2) does not apply.

History: **En. 17-1304 by Sec. 4, Ch. 449, L. 1977; R.C.M. 1947, 17-1304(part).**

27-6-105. What claims panel to review. The panel shall review all malpractice claims or potential claims against health care providers covered by this chapter except those claims subject to a valid arbitration agreement allowed by law or upon which suit has been filed prior to April 19, 1977.

History: **En. 17-1304 by Sec. 4, Ch. 449, L. 1977; R.C.M. 1947, 17-1304(part).**

27-6-106. Immunity of panel members and witnesses from civil iability. Panelists and witnesses are absolutely immune from civil liability or all communications, findings, opinions, and conclusions made in the ourse and scope of the duties prescribed by this chapter.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(5).

Part 2

Administration of Act

27-6-201. Appointment, term, and salary of director. The director f the panel shall be appointed by the executive director of the Montana nedical association, subject to the approval of the chief justice of the Monana supreme court. The director shall serve at the pleasure of, and the lirector's salary shall be set by, the executive director of the Montana medial association, subject to the approval of the chief justice.

History: En. 17-1304 by Sec. 4, Ch. 449, L. 1977; R.C.M. 1947, 17-1304(4).

27-6-202. Employment of staff and maintenance of offices. (1) The director, subject to the approval of the chief justice, may employ and fix he compensation for clerical and other assistants as he considers necessary.

(2) The panel shall maintain adequate offices, in which its records shall e kept and its official business transacted.

History: En. 17-1305 by Sec. 5, Ch. 449, L. 1977; R.C.M. 1947, 17-1305(4), (5).

27-6-203. Compensation of panel and staff. (1) All members of the anel shall be paid a salary in the amount of $40 an hour, under guidelines romulgated by the Montana supreme court.

(2) All members of the panel, the director, and his staff are entitled to ravel expenses incurred while on the business of the panel, as provided in -18-501 through 2-18-503, but such expenses shall be approved by the director before payment is made.

History: En. 17-1305 by Sec. 5, Ch. 449, L. 1977; R.C.M. 1947, 17-1305(1), (2).

27-6-204. Authority to adopt rules. The director, in consultation vith the state bar of Montana and subject to approval of the supreme court, s authorized to adopt and publish rules of procedure necessary to implement nd carry out the duties of the medical review panel. No rules may be dopted, however, which require a party to make a monetary payment as a ondition to bringing a malpractice claim before the medical review panel.

History: En. 17-1313 by Sec. 13, Ch. 449, L. 1977; R.C.M. 1947, 17-1313.

27-6-205. Powers of panel. The panel may provide for the administration of oaths, the receipt of claims filed, the promulgation of forms equired by this chapter, the issuance of subpoenas in connection with the dministration of this chapter, and the performance of all other acts required o fairly and effectively administer this chapter.

History: En. 17-1305 by Sec. 5, Ch. 449, L. 1977; R.C.M. 1947, 17-1305(3).

27-6-206. Funding. (1) There is created a pretrial review fund to be dministered by the director exclusively for the purposes stated in this chapter. The fund and any income from it shall be held in trust, deposited in an account, and invested and reinvested by the director with the prior approval of the director of the Montana medical association. The fund may not become a part of or revert to the general fund of this state but shall be open to auditing by the legislative auditor.

(2) To create the fund, an annual surcharge shall be levied on all health care providers. The amount of the assessment shall be set by the director, who shall allocate a projected cost among health care providers on a per capita basis. The director may provide a different allocation upon approval by the supreme court. Surplus funds, if any, over and above the amount required for the annual administration of the chapter shall be retained by the director and used to finance the administration of this chapter in succeeding years, in which event the director shall reduce the annual assessment in subsequent years, commensurate with the proper administration of this chapter.

(3) The annual surcharge shall be paid on or before the date physicians' annual registration fees are due under 37-3-313. The director has the same powers and duties in connection with the collection of and failure to pay the annual surcharge as the department of professional and occupational licensing has under 37-3-313 in connection with physicians' annual registration fees.

History: **En. 17-1306 by Sec. 6, Ch. 449, L. 1977; R.C.M. 1947, 17-1306(part).**

Part 3

Preliminary Procedure

27-6-301. How cases submitted. Claimants shall submit a case for the consideration of the panel prior to filing a complaint in any district court or other court sitting in Montana by addressing an application, in writing, signed by the patient or his attorney, to the director of the panel.

History: **En. 17-1304 by Sec. 4, Ch. 449, L. 1977; R.C.M. 1947, 17-1304(3).**

27-6-302. Contents of application — waiver of confidentiality of medical records. The application shall contain the following:

(1) a statement in reasonable detail of the elements of the health care provider's conduct which are believed to constitute a malpractice claim, the dates the conduct occurred, and the names and addresses of all physicians and hospitals having contact with the claimant and all witnesses;

(2) a statement authorizing the panel to obtain access to all medical and hospital records and information pertaining to the claim and, for the purposes of its consideration of this matter only, waiving any privilege as to the contents of those records. Nothing in that statement may in any way be construed as waiving that privilege for any other purpose or in any other context, in or out of court.

History: **En. 17-1307 by Sec. 7, Ch. 449, L. 1977; R.C.M. 1947, 17-1307(part).**

27-6-303. Amendments to application. Any amendments to the applicaton must be filed not less than 14 days prior to the hearing date.

History: **En. 17-1307 by Sec. 7, Ch. 449, L. 1977; R.C.M. 1947, 17-1307(part).**

27-6-304. Copies of application to professional societies when vicarious liability claimed. In instances where applications are received employing a theory of respondeat superior or some other derivative theory of recovery, the director shall forward the application to the state professional societies, associations, or licensing boards of both the individual health care provider whose alleged malpractice caused the application to be filed and the health care provider named a respondent as employer, master, or principal.

History: En. 17-1308 by Sec. 8, Ch. 449, L. 1977; R.C.M. 1947, 17-1308(3).

27-6-305. Service on health care provider. Upon receipt of an application for review, the director or his delegate shall cause to be served a true copy of the application on the health care providers involved. Service shall be effected pursuant to the Montana Rules of Civil Procedure.

History: En. 17-1308 by Sec. 8, Ch. 449, L. 1977; R.C.M. 1947, 17-1308(part).

27-6-306. Health care provider's appearance and answer — waiver of confidentiality of records. (1) If a health care provider involved chooses to retain legal counsel, his attorney shall informally enter his appearance with the director.

(2) The health care provider shall answer the application for review and shall submit a statement authorizing the panel to inspect all medical and hospital records and information pertaining to the application and, for the purposes of such inspection only, waiving any privilege as to the contents of those records. Nothing in the statement waives that privilege for any other purpose.

History: En. 17-1308 by Sec. 8, Ch. 449, L. 1977; R.C.M. 1947, 17-1308(part).

27-6-307. Assistance to defendant in obtaining expert consultation. The panel director shall cooperate fully with the claimant in retaining a physician qualified in the field of medicine involved, who will consult with the claimant upon payment of a reasonable fee by the claimant.

History: En. 17-1308 by Sec. 8, Ch. 449, L. 1977; R.C.M. 1947, 17-1308(4).

27-6-308. Director to furnish panel members with documents. At least 10 days prior to the hearing, the director shall furnish to each panel member copies of all claims, briefs, medical records, and other documents the director considers necessary.

History: En. 17-1311 by Sec. 11, Ch. 449, L. 1977; R.C.M. 1947, 17-1311(8).

Part 4

Formation and Composition of Panel

27-6-401. Composition of panel. (1) Those eligible to sit on the panel are health care providers licensed pursuant to Montana law and residing in Montana and the members of the state bar of Montana. Three panel members from the health care provider's profession and three panel members from the state bar shall sit in review of each case.

(2) In those cases where the theory of respondeat superior or some other derivative theory of recovery is employed, two of the panel members shall be

chosen from the individual health care provider's profession and one panel member shall be chosen from the profession of the health care provider named a respondent as employer, master, or principal.

History: Ap. p. 17-1304 by Sec. 4, Ch. 449, L. 1977; Sec. 17-1304, R.C.M. 1947; Ap. p. 17-1309 by Sec. 9, Ch. 449, L. 1977; Sec. 17-1309, R.C.M. 1947; R.C.M. 1947, 17-1304(2), 17-1309(4), (5).

27-6-402. Selection of panelists. (1) Application for review shall be promptly transmitted by the director to the directors of the health care provider's state professional society or association and the state bar, which shall each select three panelists within 30 days from the date of transmittal of the application.

(2) If no state professional society or association exists or if the health care provider does not belong to such a society or association, the director shall transmit the application to the health care provider's state licensing board, which shall in turn select three persons from the health care provider's profession and, where applicable, from persons specializing in the same field or discipline as the health care provider.

History: En. 17-1309 by Sec. 9, Ch. 449, L. 1977; R.C.M. 1947, 17-1309(1), (2); amd. Sec. 27, Ch. 12, L. 1979.

27-6-403. Panel in cases involving multiple defendants. Whenever there are multiple defendants, the case against each health care provider may be reviewed by a separate panel or, at the discretion of the panel initially appointed or by stipulation of the parties, a single combined panel may review all the claims against all parties defendant.

History: En. 17-1309 by Sec. 9, Ch. 449, L. 1977; R.C.M. 1947, 17-1309(3).

27-6-404. Disqualification of panel member. (1) Any member shall disqualify himself from consideration of any case in which, by virtue of his circumstances, he feels his presence on the panel would be inappropriate, considering the purpose of the panel. The director may excuse a proposed panelist from serving.

(2) Whenever a party makes and files an affidavit that a panel member selected pursuant to this part cannot, according to the belief of the party making the affidavit, sit in review of the application with impartiality, that panel member may proceed no further. Another panel member must be selected by the health care provider's professional association, state licensing board, or the state bar, as the case may be. A party may not disqualify more than three panel members in this manner in any single malpractice claim, and the affidavit must be filed at least 20 days prior to the date of hearing.

History: En. 17-1309 by Sec. 9, Ch. 449, L. 1977; R.C.M. 1947, 17-1309(6), (7).

Part 5

Hearing Procedure

27-6-501. Time and place of hearing. (1) A date, time, and place for hearing shall be fixed by the director subject to subsection (2), and prompt notice thereof shall be given to the parties involved, the attorneys, and the members of the panel. In no instance may the date set be more than 120 days after the transmittal by the director of the application for review unless the panel finds good cause exists for extending the period.

(2) Panel hearings may be held in any county the panel considers necessary or advisable. The county commissioners or other governing authority shall provide, upon request of the director of the panel, suitable facilities for any such hearing.

History: (1)En. 17-1310 by Sec. 10, Ch. 449, L. 1977; Sec. 17-1310, R.C.M. 1947; (2)En. 17-1305 by Sec. 5, Ch. 449, L. 1977; Sec. 17-1305, R.C.M. 1947; R.C.M. 1947, 17-1305(6), 17-1310.

27-6-502. Conduct of hearing. (1) At the time set for hearing, the claimant submitting the case for review shall be present and shall make a brief introduction of his case, including a resume of the facts constituting the alleged professional malpractice which he is prepared to prove. The health care provider against whom the claim is brought and his attorney may be present and may make an introductory statement of his case.

(2) Both parties may call witnesses to testify before the panel, which witnesses shall be sworn. Medical texts, journals, studies, and other documentary evidence relied upon by either party may be offered and admitted if relevant. Written statements of facts by treating health care providers may be reviewed.

(3) The hearing will be informal, and no official transcript may be made.

History: En. 17-1311 by Sec. 11, Ch. 449, L. 1977; R.C.M. 1947, 17-1311(1) thru (3).

27-6-503. Conclusion of hearing — supplemental hearing. (1) At the conclusion of the hearing, the panel may take the case under advisement or may request that additional facts, records, witnesses, or other information be obtained and presented to it at a supplemental hearing, which shall be set for a date and time certain, not longer than 30 days from the date of the original hearing unless the claimant or his attorney consents in writing to a longer period.

(2) Any supplemental hearing shall be held in the same manner as the original hearing, and the parties concerned and their attorneys may be present.

History: En. 17-1311 by Sec. 11, Ch. 449, L. 1977; R.C.M. 1947, 17-1311(4), (5); amd. Sec. 28, Ch. 12, L. 1979.

Part 6

Deliberations and Decision of Panel

27-6-601. Selection of chairman. At or prior to the time set for the hearing, the attorney members of the panel shall select a chairman who shall be an attorney and who shall preside over the panel deliberations.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(part).

27-6-602. Questions panel must decide. Upon consideration of all the relevant material, the panel shall decide whether there is:

(1) substantial evidence that the acts complained of occurred and that they constitute malpractice; and

(2) a reasonable medical probability that the patient was injured thereby.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(part).

27-6-603. Deliberations to be secret — voting. The deliberations of the panel are confidential. All votes of the panel on the questions for discussion shall be by secret ballot. The decision shall be by a majority vote of those voting members of the panel who sat on the entire case.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(part).

27-6-604. Form and content of decision. The decision shall in every case be signed for the panel by the chairman and shall contain only the conclusions reached by a majority of its members and shall list the number of members, if any, dissenting therefrom. The majority may briefly explain the reasoning and the basis for their decision, and the dissenters may likewise explain the reason for disagreement.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(3).

27-6-605. Decision to be filed and copies sent to parties, attorneys, and licensing board. The decision shall be communicated in writing to the parties and attorneys concerned, and a copy thereof shall be retained in the permanent files of the panel. A copy of the decision shall be sent to the health care provider's professional licensing board.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(part); amd. Sec. 29, Ch. 12, L. 1979.

27-6-606. Decision not binding — settlement agreements. The panel's decision is without administrative or judicial authority and is not binding upon any party. The panel may recommend an award, approve settlement agreements, and discuss the same, all in a manner not inconsistent with this part, and all such approved settlement agreements are binding on the parties.

History: En. 17-1312 by Sec. 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1312(6).

Part 7

Effect of Proceedings in Court Action — Confidentiality

27-6-701. No court action before application to and decision by panel. No malpractice claim may be filed in any court against a health care provider before an application is made to the panel and its decision is rendered.

History: En. 17-1307 by Sec. 7, Ch. 449, L. 1977; R.C.M. 1947, 17-1307(1).

27-6-702. Tolling of statute of limitations. The running of the applicable limitation period in a malpractice claim is tolled upon receipt by the director of the application for review and does not begin again until 30 days after the panel's final decision is entered in the permanent files of the panel and a copy is served upon the complainant and his attorney by certified mail.

History: En. 17-1314 by Sec. 14, Ch. 449, L. 1977; R.C.M. 1947, 17-1314.

27-6-703. Records of proceedings — confidentiality. The director shall maintain records of all proceedings before the panel, which must

clude the nature of the act or omissions complained of, a brief summary
the evidence expressed, the decision of the panel, and any majority or dis-
nting opinions filed. Any records which may identify any party to the pro-
edings may not be made public and are not subject to subpoena but are
be used solely for the purpose of compiling statistical data and facilitating
going studies of medical malpractice in Montana.

History: En. 17-1315 by Sec. 15, Ch. 449, L. 1977; R.C.M. 1947, 17-1315.

**27-6-704. Panel proceedings and decision privileged from dis-
losure in court actions.** (1) No panel member may be called to testify
any proceeding concerning the deliberations, discussions, decisions, and
ternal proceedings of the panel.

(2) No statement made by any person during a hearing before the panel
ay be used as impeaching evidence in court. The decision of the medical
view panel is not admissible as evidence in any action subsequently
ought in any court of law.

History: En. 17-1311, 17-1312 by Secs. 11, 12, Ch. 449, L. 1977; R.C.M. 1947, 17-1311(6), (7),
-1312(part); amd. Sec. 30, Ch. 12, L. 1979.

CHAPTER 7

SUBMISSION OF CONTROVERSY WITHOUT ACTION

Part 1 — General Provisions

ction
-7-101. When and in what court controversy may be submitted.
-7-102. Action by court.
-7-103. Entry of judgment — costs.
-7-104. Enforcement of judgment — appeal.

Part 1

General Provisions

**27-7-101. When and in what court controversy may be submit-
d.** Parties to a question in difference which might be subject to a civil
tion may, without action, agree upon a case containing the facts upon
ich the controversy depends and present a submission of the same to any
urt which would have jurisdiction if an action had been brought, but it
ıst appear by affidavit that the controversy is real and the proceedings in
od faith to determine the rights of the parties.

istory: En. Sec. 299, p. 106, Bannack Stat.; re-en. Sec. 355, p. 207, L. 1867; re-en. Sec. 429,
121, Cod. Stat. 1871; re-en. Sec. 455, p. 162, L. 1877; re-en. Sec. 455, 1st Div. Rev. Stat. 1879;
en. Sec. 468, 1st Div. Comp. Stat. 1887; re-en. Sec. 2050, C. Civ. Proc. 1895; re-en. Sec. 7254, Rev.
1907; re-en. Sec. 9872, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1138; re-en. Sec. 9872, R.C.M. 1935;
.M. 1947, 93-9501(part).

27-7-102. Action by court. The court must thereupon hear and determine the case and render judgment thereon as if an action were depending.

History: En. Sec. 299, p. 106, Bannack Stat.; re-en. Sec. 355, p. 207, L. 1867; re-en. Sec. 429 p. 121, Cod. Stat. 1871; re-en. Sec. 455, p. 162, L. 1877; re-en. Sec. 455, 1st Div. Rev. Stat. 1879 re-en. Sec. 468, 1st Div. Comp. Stat. 1887; re-en. Sec. 2050, C. Civ. Proc. 1895; re-en. Sec. 7254, Rev c. 1907; re-en. Sec. 9872, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1138; re-en. Sec. 9872, R.C.M. 1935 R.C.M. 1947, 93-9501(part).

27-7-103. Entry of judgment — costs. Judgment must be entered in the judgment book as in other cases but without costs for any proceeding prior to the trial.

History: En. Sec. 300, p. 106, Bannack Stat.; re-en. Sec. 356, p. 207, L. 1867; re-en. Sec. 430 p. 121, Cod. Stat. 1871; re-en. Sec. 456, p. 163, L. 1877; re-en. Sec. 456, 1st Div. Rev. Stat. 1879 re-en. Sec. 469, 1st Div. Comp. Stat. 1887; re-en. Sec. 2051, C. Civ. Proc. 1895; re-en. Sec. 7255, Rev C. 1907; re-en. Sec. 9873, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1139; re-en. Sec. 9873, R.C.M. 1935 R.C.M. 1947, 93-9502; amd. Sec. 31, Ch. 12, L. 1979.

27-7-104. Enforcement of judgment — appeal. The judgment may be enforced in the same manner as if it had been rendered in an action and is in the same manner subject to appeal.

History: En. Sec. 301, p. 106, Bannack Stat.; re-en. Sec. 357, p. 207, L. 1867; re-en. Sec. 431, p. 121, Cod. Stat. 1871; re-en. Sec. 457, p. 163, L. 1877; re-en. Sec. 457, 1st Div. Rev. Stat. 1879; re-en. Sec. 470, 1st Div. Comp. Stat. 1887; re-en. Sec. 2052, C. Civ. Proc. 1895; re-en. Sec. 7256, Rev. C. 1907; re-en. Sec. 9874, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1140; re-en. Sec. 9874, R.C.M. 1935; R.C.M. 1947, 93-9503.

CHAPTER 8

UNIFORM DECLARATORY JUDGMENTS ACT

Part 1 — General Provisions

Section
27-8-101. Short title.
27-8-102. Purpose — liberal construction.
27-8-103. Uniformity of interpretation.
27-8-104. Definition of person.

Part 2 — Availability of Declaratory Judgments

27-8-201. Scope of power to render declaratory judgments.
27-8-202. Who may obtain declaratory judgment.
27-8-203. When contract may be construed.
27-8-204. Declarations concerning administration of trusts and estates.
27-8-205. Enumeration not restrictive of general powers.
27-8-206. Court's discretion to refuse to render judgment.

Part 3 — Procedure

27-8-301. Necessary parties.
27-8-302. Jury trial.
Sections 27-8-303 through 27-8-310 reserved.
27-8-311. Costs.
27-8-312. Review of orders and judgments.
27-8-313. Supplemental relief.

Part 1

General Provisions

27-8-101. Short title. This chapter may be cited as the “Uniform eclaratory Judgments Act”.

History: En. Sec. 16, Ch. 16, L. 1935; re-en. Sec. 9835.16, R.C.M. 1935; R.C.M. 1947, 93-8916.

27-8-102. Purpose — liberal construction. This chapter is declared o be remedial; its purpose is to settle and to afford relief from uncertainty nd insecurity with respect to rights, status, and other legal relations; and it to be liberally construed and administered.

History: En. Sec. 12, Ch. 16, L. 1935; re-en. Sec. 9835.12, R.C.M. 1935; R.C.M. 1947, 93-8912.

27-8-103. Uniformity of interpretation. This chapter shall be so nterpreted and construed as to effectuate its general purpose to make uniorm the law of those states which enact it and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory udgments and decrees.

History: En. Sec. 15, Ch. 16, L. 1935; re-en. Sec. 9835.15, R.C.M. 1935; R.C.M. 1947, 93-8915.

27-8-104. Definition of person. The word “person”, wherever used in his chapter, shall be construed to mean any person, partnership, joint-stock ompany, unincorporated association, or society or municipal or other corpoation of any character whatsoever.

History: En. Sec. 13, Ch. 16, L. 1935; re-en. Sec. 9835.13, R.C.M. 1935; R.C.M. 1947, 93-8913.

Part 2

Availability of Declaratory Judgments

27-8-201. Scope of power to render declaratory judgments. ourts of record within their respective jurisdictions shall have power to eclare rights, status, and other legal relations whether or not further relief or could be claimed. No action or proceeding shall be open to objection n the ground that a declaratory judgment or decree is prayed for. The decaration may be either affirmative or negative in form and effect, and such eclarations shall have the force and effect of a final judgment or decree.

History: En. Sec. 1, Ch. 16, L. 1935; re-en. Sec. 9835.1, R.C.M. 1935; R.C.M. 1947, 93-8901.

27-8-202. Who may obtain declaratory judgment. Any person nterested under a deed, will, written contract, or other writings constituting contract or whose rights, status, or other legal relations are affected by a atute, municipal ordinance, contract, or franchise may have determined any uestion of construction or validity arising under the instrument, statute, rdinance, contract, or franchise and obtain a declaration of rights, status, or her legal relations thereunder.

History: En. Sec. 2, Ch. 16, L. 1935; re-en. Sec. 9835.2, R.C.M. 1935; R.C.M. 1947, 93-8902.

27-8-203. When contract may be construed. A contract may be nstrued either before or after there has been a breach thereof.

History: En. Sec. 3, Ch. 16, L. 1935; re-en. Sec. 9835.3, R.C.M. 1935; R.C.M. 1947, 93-8903.

27-8-204. Declarations concerning administration of trusts an estates. Any person interested as or through an executor, administrator trustee, guardian, or other fiduciary, creditor, devisee, heir, or cestui qu trust in the administration of a trust or of the estate of a decedent, minor seriously mentally ill person, or insolvent may have a declaration of rights o legal relations in respect thereto:

(1) to ascertain any class of creditors, devisees, heirs, or others;

(2) to direct the executors, administrators, or trustees to do or abstai from doing any particular act in their fiduciary capacity; or

(3) to determine any question arising in the administration of the estat or trust, including questions of construction of wills and other writings.

History: En. Sec. 4, Ch. 16, L. 1935; re-en. Sec. 9835.4, R.C.M. 1935; R.C.M. 1947, 93-8904; amd Sec. 32, Ch. 12, L. 1979.

27-8-205. Enumeration not restrictive of general powers. Th enumeration in 27-8-202 through 27-8-204 does not limit or restrict the exercise of the general powers conferred in 27-8-201 in any proceeding wher declaratory relief is sought in which a judgment or decree will terminate th controversy or remove an uncertainty.

History: En. Sec. 5, Ch. 16, L. 1935; re-en. Sec. 9835.5, R.C.M. 1935; R.C.M. 1947, 93-8905.

27-8-206. Court's discretion to refuse to render judgment. The court may refuse to render or enter a declaratory judgment or decree wher such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

History: En. Sec. 6, Ch. 16, L. 1935; re-en. Sec. 9835.6, R.C.M. 1935; R.C.M. 1947, 93-8906.

Part 3

Procedure

27-8-301. Necessary parties. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

History: En. Sec. 11, Ch. 16, L. 1935; re-en. Sec. 9835.11, R.C.M. 1935; R.C.M. 1947, 93-8911.

27-8-302. Jury trial. When a proceeding under this chapter involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

History: En. Sec. 9, Ch. 16, L. 1935; re-en. Sec. 9835.9, R.C.M. 1935; R.C.M. 1947, 93-8909.

27-8-303 through 27-8-310 reserved.

27-8-311. Costs. In any proceeding under this chapter the court may make such award of costs as may seem equitable and just.

History: En. Sec. 10, Ch. 16, L. 1935; re-en. Sec. 9835.10, R.C.M. 1935; R.C.M. 1947, 93-8910.

27-8-312. Review of orders and judgments. All orders, judgments, nd decrees under this chapter may be reviewed as other orders, judgments, nd decrees.

History: En. Sec. 7, Ch. 16, L. 1935; re-en. Sec. 9835.7, R.C.M. 1935; R.C.M. 1947, 93-8907.

27-8-313. Supplemental relief. Further relief based on a declaratory udgment or decree may be granted whenever necessary or proper. The appliation therefor shall be by petition to a court having jurisdiction to grant the elief. If the application be deemed sufficient, the court shall, on reasonable otice, require any adverse party whose rights have been adjudicated by a eclaratory judgment or decree to show cause why further relief should not e granted forthwith.

History: En. Sec. 8, Ch. 16, L. 1935; re-en. Sec. 9835.8, R.C.M. 1935; R.C.M. 1947, 93-8908.

CHAPTER 9

CONFESSION OF JUDGMENT

Part 1 — General Provisions

ection
7-9-101. When and in what courts judgment may be confessed.
7-9-102. Requirement of signed, verified statement by defendant.
7-9-103. Filing and costs — district court.
7-9-104. Filing and costs — justice's court.

Part 1

General Provisions

27-9-101. When and in what courts judgment may be confessed. Subject to 28-2-709, a judgment by confession may be entered without action, either for money due or to become due or to secure any person gainst contingent liability on behalf of the defendant, or both, in the maner prescribed by this chapter. Such judgment may be entered in any court aving jurisdiction for like amounts. Judgment upon confession may be ntered up in any justice's court specified in the confession, as provided in is chapter.

History: Ap. p. Sec. 297, p. 105, Bannack Stat.; re-en. Sec. 352, p. 206, L. 1867; re-en. Sec. 426, 120, Cod. Stat. 1871; amd. Sec. 452, p. 162, L. 1877; re-en. Sec. 452, 1st Div. Rev. Stat. 1879; -en. Sec. 465, 1st Div. Comp. Stat. 1887; re-en. Sec. 2040, C. Civ. Proc. 1895; re-en. Sec. 7250, Rev. . 1907; re-en. Sec. 9868, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1132; re-en. Sec. 9868, R.C.M. 1935; ec. 93-9401, R.C.M. 1947; Ap. p. Sec. 1620, C. Civ. Proc. 1895; re-en. Sec. 7046, Rev. C. 1907; re-en. ec. 9679, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 889; re-en. Sec. 9679, R.C.M. 1935; Sec. 93-7301, .C.M. 1935; R.C.M. 1947, 93-7301, 93-9401; amd. Sec. 33, Ch. 12, L. 1979.

27-9-102. Requirement of signed, verified statement by defendant. A statement in writing must be made, signed by the defendant, and erified by his oath to the following effect:

(1) It must authorize the entry of judgment for a specified sum.

(2) If it be for money due or to become due, it must state concisely th facts out of which it arose and show that the sum confessed therefor is justl due or to become due.

(3) If it be for the purpose of securing the plaintiff against contingent liability, it must state concisely the facts constituting the liability and sho that the sum confessed therefor does not exceed the same.

History: En. Sec. 298, p. 105, Bannack Stat.; amd. Sec. 353, p. 206, L. 1867; re-en. Sec. 427, 120, Cod. Stat. 1871; re-en. Sec. 453, p. 162, L. 1877; re-en. Sec. 453, 1st Div. Rev. Stat. 1879; re-e Sec. 466, 1st Div. Comp. Stat. 1887; re-en. Sec. 2041, C. Civ. Proc. 1895; re-en. Sec. 7251, Rev. 1907; re-en. Sec. 9869, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1133; re-en. Sec. 9869, R.C.M. 193 R.C.M. 1947, 93-9402.

27-9-103. Filing and costs — district court. The statement must b filed with the clerk of the court in which the judgment is to be entered, wh shall endorse upon it and enter in the judgment book a judgment of suc court for the amount confessed, with $10 costs.

History: En. Sec. 354, p. 206, L. 1867; re-en. Sec. 428, p. 120, Cod. Stat. 1871; re-en. Sec. 45 p. 162, L. 1877; re-en. Sec. 454, 1st Div. Rev. Stat. 1879; re-en. Sec. 467, 1st Div. Comp. Stat. 188 amd. Sec. 2042, C. Civ. Proc. 1895; re-en. Sec. 7252, Rev. C. 1907; re-en. Sec. 9870, R.C.M. 1921 Cal. C. Civ. Proc. Sec. 1134; re-en. Sec. 9870, R.C.M. 1935; R.C.M. 1947, 93-9403; amd. Sec. 3 Ch. 12, L. 1979.

27-9-104. Filing and costs — justice's court. In a justice's cour which has authority to enter the judgment, the statement may be filed wit the justice, who shall thereupon enter in his docket a judgment of his cour for the amount confessed, with costs. If a transcript of such judgment is file with the clerk of the district court, a copy of the statement must be file with it.

History: En. Sec. 2043, C. Civ. Proc. 1895; re-en. Sec. 7253, Rev. C. 1907; re-en. Sec. 9871 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1135; re-en. Sec. 9871, R.C.M. 1935; R.C.M. 1947, 93-9404 amd. Sec. 35, Ch. 12, L. 1979.

CHAPTERS 10 THROUGH 14

RESERVED

CHAPTER 15

PROVISIONAL REMEDIES

Part 1 — General Provisions

Section

27-15-101. When plaintiff may be required to elect among arrest, injunction, and attachment.
27-15-102. Availability of provisional remedies to defendant interposing counterclaim.
27-15-103. Time limit on decisions regarding arrest, injunction, or attachment.

Part 1

General Provisions

27-15-101. When plaintiff may be required to elect among arrest, injunction, and attachment. Where an application for an order f arrest, injunction order, and writ of attachment or two of them is made n the same action against the same defendant and it satisfactorily appears hat, under the particular circumstances of the case, two or all of them are ot necessary for the plaintiff's security, the court or judge may, in its or his iscretion, require the plaintiff to elect between them.

History: En. Sec. 980, C. Civ. Proc. 1895; re-en. Sec. 6708, Rev. C. 1907; re-en. Sec. 9311, R.C.M. 921; re-en. Sec. 9311, R.C.M. 1935; R.C.M. 1947, 93-4601(part).

27-15-102. Availability of provisional remedies to defendant nterposing counterclaim. Whenever the defendant interposes a counterlaim and thereupon demands an affirmative judgment against the plaintiff, is right to a provisional remedy is the same as it would be in an action rought by him against the plaintiff for the cause of action stated in the ounterclaim and demanding the same judgment. For the purpose of applyng to such a case the provisions of chapters 15 through 20 of this title and hapter 8 of Title 25, the defendant is considered the plaintiff, the plaintiff s considered the defendant, and the counterclaim so set forth in the answer s considered the complaint.

History: En. Sec. 981, C. Civ. Proc. 1895; re-en. Sec. 6709, Rev. C. 1907; re-en. Sec. 9312, R.C.M. 921; re-en. Sec. 9312, R.C.M. 1935; R.C.M. 1947, 93-4602; amd. Sec. 36, Ch. 12, L. 1979.

27-15-103. Time limit on decisions regarding arrest, injunction, r attachment. Where an application is made to obtain, vacate, modify, or et aside an order of arrest, injunction order, or writ of attachment, the court r judge must finally decide the same within 20 days after it is submitted or decision.

History: En. Sec. 980, C. Civ. Proc. 1895; re-en. Sec. 6708, Rev. C. 1907; re-en. Sec. 9311, R.C.M. 921; re-en. Sec. 9311, R.C.M. 1935; R.C.M. 1947, 93-4601(part).

CHAPTER 16

ARREST AND BAIL IN CIVIL ACTIONS

Part 1 — General Provisions

ection
7-16-101. Exclusive procedure for prejudgment arrest in civil action.
7-16-102. When defendant may be arrested.

Part 2 — Order for Arrest—Execution

7-16-201. Order from judge required.
7-16-202. Time for making order.
7-16-203. When order must be made.
7-16-204. Plaintiff's undertaking.
7-16-205. Affidavits of sureties — filing of undertaking.
7-16-206. Directions to sheriff in order.
7-16-207. Service of order and affidavit.
7-16-208. Execution of order — prepayment of expense by plaintiff.
7-16-209. Liability of sheriff for escape or rescue.
7-16-210. Recovery on sheriff's official bond.

Part 3 — Vacation of Order—Reduction of Bail

7-16-301. Proceedings to vacate order or reduce bail.

27-16-302. When order vacated or bail reduced.

Part 4 — Giving Bail

27-16-401. Discharge of defendant upon giving bail before execution.
27-16-402. Form of undertaking for bail.
27-16-403. Qualifications of sureties.
27-16-404. Filing of order with return and undertaking — plaintiff's notice of nonacceptance.
27-16-405. Notice of justification of sureties — new undertaking.
27-16-406. Procedure for justification.
27-16-407. Acceptance of sufficiency of sureties by judge or clerk.

Part 5 — Liability and Exoneration of Sureties

27-16-501. Surrender of defendant.
27-16-502. Manner and time of surrender.
27-16-503. Exoneration of sureties.
27-16-504. Action to enforce sureties' liability.
27-16-505. Other circumstances in which sureties exonerated.

Part 6 — Deposit of Money in Lieu of Bail

27-16-601. Deposit of money by defendant with sheriff.
27-16-602. Sheriff to pay money into court — certificates of payment.
27-16-603. Substituting bail for deposit.
27-16-604. Disposition of deposited money after judgment.

Parts 7 through 9 reserved

Part 10 — Arrest in Civil Actions in Justice's Court

27-16-1001. Justice's authority to order arrest.
27-16-1002. Plaintiff's affidavit and undertaking.
27-16-1003. Defendant to be taken before justice immediately.
27-16-1004. Notice to plaintiff of arrest — officer's certificate.
27-16-1005. Officer to detain defendant — expenses.
27-16-1006. Defense against order of arrest.

Part 1

General Provisions

27-16-101. Exclusive procedure for prejudgment arrest in civil action. No person may be arrested before judgment in a civil action except as prescribed by this chapter.

History: En. Sec. 72, p. 148, L. 1867; re-en. Sec. 80, p. 44, Cod. Stat. 1871; re-en. Sec. 118, p. 68, L. 1877; re-en. Sec. 118, 1st Div. Rev. Stat. 1879; re-en. Sec. 120, 1st Div. Comp. Stat. 1887; re-en. Sec. 800, C. Civ. Proc. 1895; re-en. Sec. 6595, Rev. C. 1907; re-en. Sec. 9193, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 478; re-en. Sec. 9193, R.C.M. 1935; R.C.M. 1947, 93-4001; amd. Sec. 37, Ch. 12, L. 1979.

27-16-102. When defendant may be arrested. The defendant may be arrested in the following cases:

(1) in an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state with intent to defraud his creditors;

(2) in an action for willful injury to person or character or to property which the defendant knew belonged to another;

(3) in an action for a fine or penalty or for money or property fraudulently misapplied or converted to his own use by a public officer, an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity; for misconduct or neglect in office or in a professional employment; or for a willful violation of duty;

(4) in an action to recover possession of personal property unjustly obtained, when the property or any part thereof has been concealed, removed, or disposed of so that it cannot be found or taken by the sheriff;

(5) when the defendant has been guilty of fraud in contracting the debt or incurring the obligation for which the action is brought or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought;

(6) when the defendant has removed or disposed of his property or is about to do so with intent to defraud his creditors.

History: En. Sec. 73, p. 148, L. 1867; re-en. Sec. 81, p. 44, Cod. Stat. 1871; re-en. Sec. 119, p. 68, L. 1877; re-en. Sec. 119, 1st Div. Rev. Stat. 1879; re-en. Sec. 121, 1st Div. Comp. Stat. 1887; re-en. Sec. 801, C. Civ. Proc. 1895; re-en. Sec. 6596, Rev. C. 1907; re-en. Sec. 9194, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 479; re-en. Sec. 9194, R.C.M. 1935; amd. Sec. 69, Ch. 359, L. 1977; R.C.M. 1947, 93-4002; amd. Sec. 38, Ch. 12, L. 1979.

Part 2

Order for Arrest — Execution

27-16-201. Order from judge required. An order for the arrest of the defendant must be obtained from the judge of the court in which the action is brought.

History: En. Sec. 74, p. 148, L. 1867; re-en. Sec. 82, p. 44, Cod. Stat. 1871; re-en. Sec. 120, p. 68, L. 1877; re-en. Sec. 120, 1st Div. Rev. Stat. 1879; re-en. Sec. 122, 1st Div. Comp. Stat. 1887; re-en. Sec. 802, C. Civ. Proc. 1895; re-en. Sec. 6597, Rev. C. 1907; re-en. Sec. 9195, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 480; re-en. Sec. 9195, R.C.M. 1935; R.C.M. 1947, 93-4003.

27-16-202. Time for making order. The order may be made at the time of issuing the summons or at any time afterwards before judgment.

History: En. Sec. 77, p. 148, L. 1867; re-en. Sec. 85, p. 44, Cod. Stat. 1871; re-en. Sec. 123, p. 69, L. 1877; re-en. Sec. 123, 1st Div. Rev. Stat. 1879; re-en. Sec. 125, 1st Div. Comp. Stat. 1887; re-en. Sec. 805, C. Civ. Proc. 1895; re-en. Sec. 6600, Rev. C. 1907; re-en. Sec. 9198, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 483; re-en. Sec. 9198, R.C.M. 1935; R.C.M. 1947, 93-4006(part).

27-16-203. When order must be made. The order must be made whenever it shall appear to the judge, by the affidavit of the plaintiff or some other person, that a sufficient cause of action exists and that the case is one of those mentioned in 27-16-102.

History: En. Secs. 75, 76, p. 148, L. 1867; re-en. Sec. 83, p. 44, Cod. Stat. 1871; re-en. Sec. 121, p. 69, L. 1877; re-en. Sec. 121, 1st Div. Rev. Stat. 1879; re-en. Sec. 123, 1st Div. Comp. Stat. 1887; amd. Sec. 803, C. Civ. Proc. 1895; re-en. Sec. 6598, Rev. C. 1907; re-en. Sec. 9196, R.C.M. 1921; Cal. C. Civ. Proc. Secs. 481, 482; re-en. Sec. 9196, R.C.M. 1935; R.C.M. 1947, 93-4004(part).

27-16-204. Plaintiff's undertaking. Before making the order, the judge must require a written undertaking on the part of the plaintiff, with at least two sufficient sureties, to the effect that, if the defendant recover judgment or if the court shall finally decide that the plaintiff was not entitled to an order of arrest, the plaintiff will pay all costs and charges that may be awarded to the defendant and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking, which shall be at least $500.

History: En. Secs. 75, 76, p. 148, L. 1867; re-en. Sec. 83, p. 44, Cod. Stat. 1871; re-en. Sec. 121, p. 69, L. 1877; re-en. Sec. 121, 1st Div. Rev. Stat. 1879; re-en. Sec. 123, 1st Div. Comp. Stat. 1887; amd. Sec. 803, C. Civ. Proc. 1895; re-en. Sec. 6598, Rev. C. 1907; re-en. Sec. 9196, R.C.M. 1921; Cal. C. Civ. Proc. Secs. 481, 482; re-en. Sec. 9196, R.C.M. 1935; R.C.M. 1947, 93-4004(part).

27-16-205. Affidavits of sureties — filing of undertaking. Each of the sureties must annex to the undertaking an affidavit that he is a resident and householder or freeholder within the state and worth double the sum specified in the undertaking, over and above all his debts and liabilities, exclusive of property exempt from execution. The undertaking must be filed with the clerk of the court.

History: En. Sec. 76, p. 148, L. 1867; re-en. Sec. 84, p. 44, Cod. Stat. 1871; re-en. Sec. 122, p. 69, L. 1877; re-en. Sec. 122, 1st Div. Rev. Stat. 1879; re-en. Sec. 124, 1st Div. Comp. Stat. 1887; re-en. Sec. 804, C. Civ. Proc. 1895; re-en. Sec. 6599, Rev. C. 1907; re-en. Sec. 9197, R.C.M. 1921; re-en. Sec. 9197, R.C.M. 1935; R.C.M. 1947, 93-4005.

27-16-206. Directions to sheriff in order. The order must require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum and to return the order at a time therein mentioned to the clerk of the court in which the action is pending.

History: En. Sec. 77, p. 148, L. 1867; re-en. Sec. 85, p. 44, Cod. Stat. 1871; re-en. Sec. 123, p. 69, L. 1877; re-en. Sec. 123, 1st Div. Rev. Stat. 1879; re-en. Sec. 125, 1st Div. Comp. Stat. 1887; re-en. Sec. 805, C. Civ. Proc. 1895; re-en. Sec. 6600, Rev. C. 1907; re-en. Sec. 9198, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 483; re-en. Sec. 9198, R.C.M. 1935; R.C.M. 1947, 93-4006(part).

27-16-207. Service of order and affidavit. The order of arrest, with a copy of the affidavit upon which it is made, must be delivered to the sheriff, who, upon arresting the defendant, shall deliver him a copy of the affidavit and also, if defendant desires, a copy of the order of arrest.

History: En. Sec. 78, p. 149, L. 1867; re-en. Sec. 86, p. 45, Cod. Stat. 1871; re-en. Sec. 124, p. 69, L. 1877; re-en. Sec. 124, 1st Div. Rev. Stat. 1879; re-en. Sec. 126, 1st Div. Comp. Stat. 1887; re-en. Sec. 806, C. Civ. Proc. 1895; re-en. Sec. 6601, Rev. C. 1907; re-en. Sec. 9199, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 484; re-en. Sec. 9199, R.C.M. 1935; R.C.M. 1947, 93-4007.

27-16-208. Execution of order — prepayment of expense by plaintiff. The sheriff must execute the order by arresting the defendant and keeping him in custody until discharged by law. But the sheriff is not bound to keep such person under arrest more than 24 hours unless the plaintiff advance each day the expense of keeping such person, which expense shall be taxed as costs in the action and in no case shall be a charge against the county.

History: En. Sec. 79, p. 149, L. 1867; en. Sec. 87, p. 45, Cod. Stat. 1871; re-en. Sec. 125, p. 69, L. 1877; re-en. Sec. 125, 1st Div. Rev. Stat. 1879; re-en. Sec. 127, 1st Div. Comp. Stat. 1887; re-en. Sec. 807, C. Civ. Proc. 1895; re-en. Sec. 6602, Rev. C. 1907; re-en. Sec. 9200, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 485; re-en. Sec. 9200, R.C.M. 1935; R.C.M. 1947, 93-4008.

27-16-209. Liability of sheriff for escape or rescue. If after being arrested the defendant escape or be rescued, the sheriff is liable as bail, but he may discharge himself from such liability by the giving and justification of bail at any time before judgment.

History: En. Sec. 95, p. 151, L. 1867; re-en. Sec. 103, p. 48, Cod. Stat. 1871; re-en. Sec. 141, p. 73, L. 1877; re-en. Sec. 141, 1st Div. Rev. Stat. 1879; re-en. Sec. 143, 1st Div. Comp. Stat. 1887; re-en. Sec. 823, C. Civ. Proc. 1895; re-en. Sec. 6618, Rev. C. 1907; re-en. Sec. 9216, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 501; re-en. Sec. 9216, R.C.M. 1935; R.C.M. 1947, 93-4024.

27-16-210. Recovery on sheriff's official bond. If a judgment be recovered against the sheriff upon his liability as bail and an execution thereon be returned unsatisfied in whole or in part, the same proceeding may be had on his official bond for the recovery of the whole or any deficiency as in other cases of delinquency.

History: En. Sec. 96, p. 151, L. 1867; re-en. Sec. 104, p. 48, Cod. Stat. 1871; re-en. Sec. 142, p. 73, L. 1877; re-en. Sec. 142, 1st Div. Rev. Stat. 1879; re-en. Sec. 144, 1st Div. Comp. Stat. 1887; re-en. Sec. 824, C. Civ. Proc. 1895; re-en. Sec. 6619, Rev. C. 1907; re-en. Sec. 9217, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 502; re-en. Sec. 9217, R.C.M. 1935; R.C.M. 1947, 93-4025.

Part 3

Vacation of Order — Reduction of Bail

27-16-301. Proceedings to vacate order or reduce bail. A defendant arrested may, at any time before justification of bail, apply to the judge who made the order or the court in which the action is pending, upon reasonable notice to the plaintiff, to vacate the order of arrest or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs in addition to those on which the order of arrest was made.

History: En. Sec. 97, p. 151, L. 1867; re-en. Sec. 105, p. 48, Cod. Stat. 1871; re-en. Sec. 143, p. 73, L. 1877; re-en. Sec. 143, 1st Div. Rev. Stat. 1879; re-en. Sec. 145, 1st Div. Comp. Stat. 1887; re-en. Sec. 825, C. Civ. Proc. 1895; re-en. Sec. 6620, Rev. C. 1907; re-en. Sec. 9218, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 503; re-en. Sec. 9218, R.C.M. 1935; R.C.M. 1947, 93-4026.

27-16-302. When order vacated or bail reduced. If, upon such application, it satisfactorily appears that there was not sufficient cause for the arrest, the order shall be vacated; or if it satisfactorily appears that the bail was fixed too high, the amount shall be reduced.

History: En. Sec. 98, p. 151, L. 1867; re-en. Sec. 106, p. 48, Cod. Stat. 1871; re-en. Sec. 144, p. 73, L. 1877; re-en. Sec. 144, 1st Div. Rev. Stat. 1879; re-en. Sec. 146, 1st Div. Comp. Stat. 1887; re-en. Sec. 826, C. Civ. Proc. 1895; re-en. Sec. 6621, Rev. C. 1907; re-en. Sec. 9219, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 504; re-en. Sec. 9219, R.C.M. 1935; R.C.M. 1947, 93-4027.

Part 4

Giving Bail

27-16-401. Discharge of defendant upon giving bail before execution. The defendant, at any time before execution, is discharged from arrest either upon giving bail or upon depositing the amount mentioned in he order, as provided in this chapter.

History: En. Sec. 80, p. 149, L. 1867; re-en. Sec. 88, p. 45, Cod. Stat. 1871; re-en. Sec. 126, p. 0, L. 1877; re-en. Sec. 126, 1st Div. Rev. Stat. 1879; re-en. Sec. 128, 1st Div. Comp. Stat. 1887; re-en. ec. 808, C. Civ. Proc. 1895; re-en. Sec. 6603, Rev. C. 1907; re-en. Sec. 9201, R.C.M. 1921; Cal. C. iv. Proc. Sec. 486; re-en. Sec. 9201, R.C.M. 1935; R.C.M. 1947, 93-4009.

27-16-402. Form of undertaking for bail. The defendant may give bail by causing a written undertaking to be executed by two or more sufficient sureties, stating their places of residence and occupations, to the effect that they are bound in the amount mentioned in the order of arrest, that the defendant shall at all times render himself amenable to the process of the court during the pendency of the action and to such as may be issued to enforce the judgment therein or that they will pay to the plaintiff the amount of any judgment which may be recovered in the action.

History: En. Sec. 81, p. 149, L. 1867; re-en. Sec. 89, p. 45, Cod. Stat. 1871; re-en. Sec. 127, p. 70, L. 1877; re-en. Sec. 127, 1st Div. Rev. Stat. 1879; re-en. Sec. 129, 1st Div. Comp. Stat. 1887; re-en. Sec. 809, C. Civ. Proc. 1895; re-en. Sec. 6604, Rev. C. 1907; re-en. Sec. 9202, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 487; re-en. Sec. 9202, R.C.M. 1935; R.C.M. 1947, 93-4010.

27-16-403. Qualifications of sureties. The qualifications of bail shall be as follows:

(1) Each of them must be a resident and householder or freeholder within the county.

(2) Each must be worth the amount specified in the order of arrest or the amount to which the order is reduced, as provided in this chapter, over and above all his debts and liabilities, exclusive of property exempt from execution; but the judge or clerk, on justification, may allow more than two sureties to justify severally, in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

History: En. Sec. 88, p. 150, L. 1867; re-en. Sec. 96, p. 46, Cod. Stat. 1871; re-en. Sec. 134, p. 71, L. 1877; re-en. Sec. 134, 1st Div. Rev. Stat. 1879; re-en. Sec. 136, 1st Div. Comp. Stat. 1887; re-en. Sec. 816, C. Civ. Proc. 1895; re-en. Sec. 6611, Rev. C. 1907; re-en. Sec. 9209, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 494; re-en. Sec. 9209, R.C.M. 1935; R.C.M. 1947, 93-4017.

27-16-404. Filing of order with return and undertaking — plaintiff's notice of nonacceptance. (1) Within the time limited for that purpose, the sheriff must file the order of arrest in the office of the clerk of the court in which the action is pending, with his return endorsed thereon, together with a copy of the undertaking of the bail. The original undertaking he must retain in his possession until filed, as herein provided.

(2) The plaintiff, within 10 days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he shall be deemed to have accepted them and the sheriff shall be exonerated from liability. If no notice be served within 10 days, the original undertaking must be filed with the clerk of the court.

History: En. Sec. 86, p. 150, L. 1867; re-en. Sec. 94, p. 46, Cod. Stat. 1871; re-en. Sec. 132, p. 71, L. 1877; re-en. Sec. 132, 1st Div. Rev. Stat. 1879; re-en. Sec. 134, 1st Div. Comp. Stat. 1887; re-en. Sec. 814, C. Civ. Proc. 1895; re-en. Sec. 6609, Rev. C. 1907; re-en. Sec. 9207, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 492; re-en. Sec. 9207, R.C.M. 1935; R.C.M. 1947, 93-4015.

27-16-405. Notice of justification of sureties — new undertaking. Within 5 days after receipt of notice, the sheriff or defendant may give to the plaintiff or his attorney notice of the justification of the same or other bail (specifying the place of residence and occupation of the latter) before a judge of the court or clerk thereof, at a specified time and place, the time not to be less than 5 or more than 10 days thereafter, except by consent of parties. In case other bail is given, there shall be a new undertaking.

History: En. Sec. 87, p. 150, L. 1867; re-en. Sec. 95, p. 46, Cod. Stat. 1871; re-en. Sec. 133, p. 71, L. 1877; re-en. Sec. 133, 1st Div. Rev. Stat. 1879; re-en. Sec. 135, 1st Div. Comp. Stat. 1887; re-en.

Sec. 815, C. Civ. Proc. 1895; re-en. Sec. 6610, Rev. C. 1907; re-en. Sec. 9208, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 493; re-en. Sec. 9208, R.C.M. 1935; R.C.M. 1947, 93-4016.

27-16-406. Procedure for justification. For the purpose of justification, each of the bail must attend before the judge or clerk at the time and place mentioned in the notice and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge or clerk, in his discretion, may think proper. The examination shall be reduced to writing and subscribed by the bail if required by the plaintiff.

History: En. Sec. 89, p. 150, L. 1867; re-en. Sec. 97, p. 47, Cod. Stat. 1871; re-en. Sec. 135, p. 72, L. 1877; re-en. Sec. 135, 1st Div. Rev. Stat. 1879; re-en. Sec. 137, 1st Div. Comp. Stat. 1887; re-en. Sec. 817, C. Civ. Proc. 1895; re-en. Sec. 6612, Rev. C. 1907; re-en. Sec. 9210, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 495; re-en. Sec. 9210, R.C.M. 1935; R.C.M. 1947, 93-4018.

27-16-407. Acceptance of sufficiency of sureties by judge or clerk. If the judge or clerk shall find the bail sufficient, he must annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed, and the sheriff shall thereupon be exonerated from liability.

History: En. Sec. 90, p. 150, L. 1867; re-en. Sec. 98, p. 47, Cod. Stat. 1871; re-en. Sec. 136, p. 72, L. 1877; re-en. Sec. 136, 1st Div. Rev. Stat. 1879; re-en. Sec. 138, 1st Div. Comp. Stat. 1887; re-en. Sec. 818, C. Civ. Proc. 1895; re-en. Sec. 6613, Rev. C. 1907; re-en. Sec. 9211, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 496; re-en. Sec. 9211, R.C.M. 1935; R.C.M. 1947, 93-4019.

Part 5

Liability and Exoneration of Sureties

27-16-501. Surrender of defendant. At any time before judgment or within 10 days thereafter, the bail may surrender the defendant in their exoneration or he may surrender himself to the sheriff of the county where he was arrested.

History: En. Sec. 82, p. 149, L. 1867; re-en. Sec. 90, p. 45, Cod. Stat. 1871; re-en. Sec. 128, p. 70, L. 1877; re-en. Sec. 128, 1st Div. Rev. Stat. 1879; re-en. Sec. 130, 1st Div. Comp. Stat. 1887; re-en. Sec. 810, C. Civ. Proc. 1895; re-en. Sec. 6605, Rev. C. 1907; re-en. Sec. 9203, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 488; re-en. Sec. 9203, R.C.M. 1935; R.C.M. 1947, 93-4011.

27-16-502. Manner and time of surrender. For the purpose of surrendering the defendant, the bail, at any time or place before they are finally charged, may themselves arrest him or, by a written authority endorsed on a certified copy of the undertaking, may empower the sheriff to do so.

History: En. Sec. 83, p. 149, L. 1867; re-en. Sec. 91, p. 45, Cod. Stat. 1871; re-en. Sec. 129, p. 70, L. 1877; re-en. Sec. 129, 1st Div. Rev. Stat. 1879; re-en. Sec. 131, 1st Div. Comp. Stat. 1887; re-en. Sec. 811, C. Civ. Proc. 1895; re-en. Sec. 6606, Rev. C. 1907; re-en. Sec. 9204, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 489; re-en. Sec. 9204, R.C.M. 1935; R.C.M. 1947, 93-4012(part).

27-16-503. Exoneration of sureties. Upon arrest of the defendant by the sheriff or upon his delivery to the sheriff by the bail or upon his own surrender, the bail shall be exonerated, provided such arrest, delivery, or surrender take place before the expiration of 10 days after judgment; but if such arrest, delivery, or surrender be not made within 10 days after the judgment, the bail shall be finally charged on their undertaking and be bound to pay the amount of the judgment within 10 days thereafter.

History: En. Sec. 83, p. 149, L. 1867; re-en. Sec. 91, p. 45, Cod. Stat. 1871; re-en. Sec. 129, p. 70, L. 1877; re-en. Sec. 129, 1st Div. Rev. Stat. 1879; re-en. Sec. 131, 1st Div. Comp. Stat. 1887; re-en.

Sec. 811, C. Civ. Proc. 1895; re-en. Sec. 6606, Rev. C. 1907; re-en. Sec. 9204, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 489; re-en. Sec. 9204, R.C.M. 1935; R.C.M. 1947, 93-4012(part).

27-16-504. Action to enforce sureties' liability. If the bail neglect or refuse to pay the judgment within 10 days after they are finally charged, an action may be commenced against such bail for the amount of such original judgment.

History: En. Sec. 84, p. 149, L. 1867; re-en. Sec. 92, p. 45, Cod. Stat. 1871; re-en. Sec. 130, p. 70, L. 1877; re-en. Sec. 130, 1st Div. Rev. Stat. 1879; re-en. Sec. 132, 1st Div. Comp. Stat. 1887; re-en. Sec. 812, C. Civ. Proc. 1895; re-en. Sec. 6607, Rev. C. 1907; re-en. Sec. 9205, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 490; re-en. Sec. 9205, R.C.M. 1935; R.C.M. 1947, 93-4013.

27-16-505. Other circumstances in which sureties exonerated. The bail must also be exonerated by the death of the defendant, his imprisonment in the state penitentiary or prison, or his legal discharge from the obligation to render himself amenable to the process.

History: En. Sec. 85, p. 149, L. 1867; re-en. Sec. 93, p. 46, Cod. Stat. 1871; re-en. Sec. 131, p. 71, L. 1877; re-en. Sec. 131, 1st Div. Rev. Stat. 1879; re-en. Sec. 133, 1st Div. Comp. Stat. 1887; re-en. Sec. 813, C. Civ. Proc. 1895; re-en. Sec. 6608, Rev. C. 1907; re-en. Sec. 9206, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 491; re-en. Sec. 9206, R.C.M. 1935; R.C.M. 1947, 93-4014.

Part 6

Deposit of Money in Lieu of Bail

27-16-601. Deposit of money by defendant with sheriff. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. In case the amount of bail be reduced, as provided in this chapter, the defendant may deposit such amount instead of giving bail. In either case, the sheriff shall give the defendant a certificate of the deposit made, and the defendant shall be discharged from custody.

History: En. Sec. 91, p. 150, L. 1867; re-en. Sec. 99, p. 47, Cod. Stat. 1871; re-en. Sec. 137, p. 72, L. 1877; re-en. Sec. 137, 1st Div. Rev. Stat. 1879; re-en. Sec. 139, 1st Div. Comp. Stat. 1887; re-en. Sec. 819, C. Civ. Proc. 1895; re-en. Sec. 6614, Rev. C. 1907; re-en. Sec. 9212, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 497; re-en. Sec. 9212, R.C.M. 1935; R.C.M. 1947, 93-4020.

27-16-602. Sheriff to pay money into court — certificates of payment. The sheriff must, immediately after the deposit, pay the same into court and take from the clerk receiving the same two certificates of such payment, one of which he must deliver or transmit to the plaintiff or his attorney and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff to collect the sum deposited as in other cases of delinquency.

History: En. Sec. 92, p. 151, L. 1867; re-en. Sec. 100, p. 47, Cod. Stat. 1871; re-en. Sec. 138, p. 72, L. 1877; re-en. Sec. 138, 1st Div. Rev. Stat. 1879; re-en. Sec. 140, 1st Div. Comp. Stat. 1887; re-en. Sec. 820, C. Civ. Proc. 1895; re-en. Sec. 6615, Rev. C. 1907; re-en. Sec. 9213, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 498; re-en. Sec. 9213, R.C.M. 1935; R.C.M. 1947, 93-4021.

27-16-603. Substituting bail for deposit. If money be deposited, as provided in 27-16-601 and 27-16-602, bail may be given and may justify upon notice at any time before judgment; and on the filing of the undertaking and justification with the clerk, the money deposited shall be refunded by such clerk to the defendant.

History: En. Sec. 93, p. 151, L. 1867; re-en. Sec. 101, p. 47, Cod. Stat. 1871; re-en. Sec. 139, p. 72, L. 1877; re-en. Sec. 139, 1st Div. Rev. Stat. 1879; re-en. Sec. 141, 1st Div. Comp. Stat. 1887; re-en. Sec. 821, C. Civ. Proc. 1895; re-en. Sec. 6616, Rev. C. 1907; re-en. Sec. 9214, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 499; re-en. Sec. 9214, R.C.M 1935; R.C.M. 1947, 93-4022.

27-16-604. Disposition of deposited money after judgment. Where money shall have been deposited, if it remains on deposit at the time of recovery of a judgment in favor of the plaintiff, the clerk must, under direction of the court, apply the same in satisfaction thereof and, after satisfying the judgment, refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk must, under the direction of the court, refund him the whole sum deposited and remaining unapplied.

History: En. Sec. 94, p. 151, L. 1867; re-en. Sec. 102, p. 48, Cod. Stat. 1871; re-en. Sec. 140, p. 73, L. 1877; re-en. Sec. 140, 1st Div. Rev. Stat. 1879; re-en. Sec. 142, 1st Div. Comp. Stat. 1887; re-en. Sec. 822, C. Civ. Proc. 1895; re-en. Sec. 6617, Rev. C. 1907; re-en. Sec. 9215, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 500; re-en. Sec. 9215, R.C.M. 1935; R.C.M. 1947, 93-4023.

Parts 7 through 9 reserved

Part 10

Arrest in Civil Actions in Justice's Court

27-16-1001. Justice's authority to order arrest. An order to arrest the defendant may be endorsed on a summons issued by the justice, and the defendant may be arrested thereon by the sheriff or constable at the time of serving the summons and brought before the justice and there detained until duly discharged, in the cases mentioned in 27-16-102.

History: En. Sec. 560, p. 153, Bannack Stat.; re-en. Sec. 666, p. 170, Cod. Stat. 1871; re-en. Sec. 726, 1st Div. Rev. Stat. 1879; re-en. Sec. 746, 1st Div. Comp. Stat. 1887; amd. Sec. 1540, C. Civ. Proc. 1895; re-en. Sec. 7019, Rev. C. 1907; re-en. Sec. 9652, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 861; re-en. Sec. 9652, R.C.M. 1935; R.C.M. 1947, 93-6901.

27-16-1002. Plaintiff's affidavit and undertaking. Before an order of arrest can be made, the party applying must prove to the satisfaction of the justice, by the affidavit of himself or some other person, the facts upon which the application is founded. The plaintiff must also execute and deliver to the justice a written undertaking in the sum of $300, with sufficient sureties, to the effect that the plaintiff will pay all costs that may be adjudged to the defendant and all damages which he may sustain by reason of the arrest, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the undertaking.

History: En. Sec. 561, p. 154, Bannack Stat.; re-en. Sec. 667, p. 170, Cod. Stat. 1871; re-en. Sec. 727, 1st Div. Rev. Stat. 1879; re-en. Sec. 747, 1st Div. Comp. Stat. 1887; amd. Sec. 1541, C. Civ. Proc. 1895; re-en. Sec. 7020, Rev. C. 1907; re-en. Sec. 9653, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 862; re-en. Sec. 9653, R.C.M. 1935; R.C.M. 1947, 93-6902.

27-16-1003. Defendant to be taken before justice immediately. The defendant, immediately upon being arrested, must be taken to the office of the justice who made the order; and if he is absent or unable to try the action or if it appears to him by the affidavit of defendant that he is a material witness in the action, the officer must immediately take the defendant before another justice of the county, if there is another, and if not, then before a justice of an adjoining county, who must take jurisdiction of the action and proceed thereon as if the summons had been issued and the order of arrest made by him.

History: En. Sec. 562, p. 154, Bannack Stat.; re-en. Sec. 668, p. 171, Cod. Stat. 1871; re-en. Sec. 728, 1st Div. Rev. Stat. 1879; re-en. Sec. 748, 1st Div. Comp. Stat. 1887; amd. Sec. 1542, C. Civ. Proc. 1895; re-en. Sec. 7021, Rev. C. 1907; re-en. Sec. 9654, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 863; re-en. Sec. 9654, R.C.M. 1935; amd. Sec. 18, Ch. 491, L. 1973; R.C.M. 1947, 93-6903.

27-16-1004. Notice to plaintiff of arrest — officer's certificate. The officer making the arrest must immediately give notice thereof to the plaintiff or his attorney or agent and endorse on the summons and subscribe a certificate, stating the time of serving the same and the time of arrest and of his giving notice to the plaintiff.

History: En. Sec. 563, p. 154, Bannack Stat.; re-en. Sec. 669, p. 171, Cod. Stat. 1871; re-en. Sec. 729, 1st Div. Rev. Stat. 1879; re-en. Sec. 749, 1st Div. Comp. Stat. 1887; re-en. Sec. 1543, C. Civ. Proc. 1895; re-en. Sec. 7022, Rev. C. 1907; re-en. Sec. 9655, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 864; re-en. Sec. 9655, R.C.M. 1935; R.C.M. 1947, 93-6904.

27-16-1005. Officer to detain defendant — expenses. The officer making the arrest must keep the defendant in custody until he is discharged by order of the justice. The officer shall not be bound to keep such person under arrest more than 24 hours unless the plaintiff advance each day the expenses of keeping such person, which expense shall be taxed as costs in the action and in no case shall be a charge against the county.

History: En. Sec. 564, p. 154, Bannack Stat.; re-en. Sec. 670, p. 171, Cod. Stat. 1871; re-en. Sec. 730, 1st Div. Rev. Stat. 1879; re-en. Sec. 750, 1st Div. Comp. Stat. 1887; re-en. Sec. 1544, C. Civ. Proc. 1895; re-en. Sec. 7023, Rev. C. 1907; re-en. Sec. 9656, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 865; re-en. Sec. 9656, R.C.M. 1935; R.C.M. 1947, 93-6905.

27-16-1006. Defense against order of arrest. The defendant may file an answer, under oath, putting in issue the facts stated in the affidavit for the order of arrest, which may be tried by the court unless a jury is demanded; and the plaintiff shall be held to establish such facts, and if he fail to do so, the order of arrest shall be dismissed and the defendant may proceed upon the undertaking of the plaintiff for his damages occasioned by the arrest. The defendant may apply to the court to be discharged from arrest upon the ground of the insufficiency of the papers on which the order of arrest was granted.

History: En. Sec. 567, p. 155, Bannack Stat.; re-en. Sec. 673, p. 171, Cod. Stat. 1871; re-en. Sec. 733, 1st Div. Rev. Stat. 1879; re-en. Sec. 753, 1st Div. Comp. Stat. 1887; re-en. Sec. 1545, C. Civ. Proc. 1895; re-en. Sec. 7024, Rev. C. 1907; re-en. Sec. 9657, R.C.M. 1921; re-en. Sec. 9657, R.C.M. 1935; R.C.M. 1947, 93-6906.

CHAPTER 17

CLAIM AND DELIVERY OF PERSONAL PROPERTY

Part 1 — General Provisions

Section
27-17-101. When plaintiff may claim delivery.
27-17-102. Claim and delivery in justice's court.

Part 2 — Procedure for Obtaining Seizure of Property

27-17-201. Plaintiff's affidavit.
27-17-202. Description of property in affidavit.
27-17-203. Order from judge.
27-17-204. Endorsement requiring sheriff to take property.
27-17-205. Plaintiff's undertaking — service and execution by sheriff.
27-17-206. Manner of seizure of concealed property.
27-17-207. Seizure when part of property cannot be found.

Part 3 — Procedure Following Seizure by Sheriff

27-17-301. Duty of sheriff to keep and deliver property.
27-17-302. Sheriff's return of execution.
27-17-303. Exception to plaintiff's sureties — justification — liability of sheriff.
27-17-304. When defendant may require return of property — his undertaking.
27-17-305. Return of part of the property.
27-17-306. Justification of defendant's sureties — liability of sheriff.
27-17-307. Procedure for qualification and justification of sureties.
27-17-308. Delivery of property to plaintiff if not returned to defendant.
27-17-309. Claim of property by third person — plaintiff to indemnify sheriff.
27-17-310. Answer of defendant claiming third person entitled to property.

Part 4 — Judgment—Return of Property

27-17-401. Form of judgment.
27-17-402. Duty to return property in good condition.
27-17-403. Action for value of property and damages.
27-17-404. Return of damaged property to officer for sale.
27-17-405. Continuing liability of sureties.

Part 1

General Provisions

27-17-101. When plaintiff may claim delivery. The plaintiff in an action to recover possession of personal property may, at the time of issuing summons or at any time thereafter before answer, claim the delivery of such property to him, as provided in this chapter.

History: En. Sec. 71, p. 56, Bannack Stat.; re-en. Sec. 99, p. 151, L. 1867; re-en. Sec. 116, p. 49, Cod. Stat. 1871; re-en. Sec. 154, p. 75, L. 1877; re-en. Sec. 154, 1st Div. Rev. Stat. 1879; re-en. Sec. 156, 1st Div. Comp. Stat. 1887; re-en. Sec. 840, C. Civ. Proc. 1895; re-en. Sec. 6622, Rev. C. 1907; re-en. Sec. 9220, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 509; re-en. Sec. 9220, R.C.M. 1935; R.C.M. 1947, 93-4101.

27-17-102. Claim and delivery in justice's court. Parts 2, 3, and 4 of this chapter and Rule 55(b)(2), M.R.Civ.P., are applicable to such claim when made in justices' courts, the powers therein given and duties imposed on sheriffs being extended to constables and the word "justice" substituted for "judge", and the justice, instead of the plaintiff or his attorney, may, in his discretion, by an endorsement in writing upon the affidavit, order the sheriff or constable to take the property mentioned in the affidavit.

History: En. Sec. 572, p. 156, Bannack Stat.; re-en. Sec. 678, p. 172, Cod. Stat. 1871; re-en. Sec. 738, 1st Div. Comp. Stat. 1879; re-en. Sec. 758, 1st Div. Comp. Stat. 1887; amd. Sec. 1570, C. Civ. Proc. 1895; re-en. Sec. 7030, Rev. C. 1907; re-en. Sec. 9663, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 870; re-en. Sec. 9663, R.C.M. 1935; R.C.M. 1947, 93-6912(part).

Part 2

Procedure for Obtaining Seizure of Property

27-17-201. Plaintiff's affidavit. When a delivery is claimed, an affidavit must be made by the person claiming the property or someone in his behalf, stating:

(1) facts which establish reasonable belief that the person claiming the property is the owner or is lawfully entitled to possession and that the seizure is necessary to prevent the removal or destruction of the property;

(2) that the property is wrongfully detained by the defendant;

(3) that the same has not been taken for a tax, assessment, or fine, pursuant to statute, or seized under an execution or an attachment against the property of the person claiming the property or, if so seized, that it is by statute exempt from seizure; and

(4) a particular description of the property and the actual value of the property.

History: En. Sec. 72, p. 56, Bannack Stat.; amd. Sec. 100, p. 151, L. 1867; re-en. Sec. 117, p. 49, Cod. Stat. 1871; re-en. Sec. 155, p. 75, L. 1877; re-en. Sec. 155, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 103, L. 1885; re-en. Sec. 157, 1st Div. Comp. Stat. 1887; re-en. Sec. 841, C. Civ. Proc. 1895; re-en. Sec. 6623, Rev. C. 1907; re-en. Sec. 9221, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 510; re-en. Sec. 9221, R.C.M. 1935; amd. Sec. 1, Ch. 362, L. 1975; R.C.M. 1947, 93-4102(1).

27-17-202. Description of property in affidavit. Where the affidavit describes two or more chattels of the same kind, it must state the number thereof, and where it describes a chattel in bulk, it must state the weight, measurement, or other quantity, as nearly as can be ascertained. Where it describes two or more chattels, it may, at the election of the plaintiff, state the aggregate value of all or, separately, the value of any chattel or of any class of chattels and the aggregate value of the remainder, if any.

History: En. Sec. 856, C. Civ. Proc. 1895; re-en. Sec. 6638, Rev. C. 1907; re-en. Sec. 9236, R.C.M. 1921; re-en. Sec. 9236, R.C.M. 1935; R.C.M. 1947, 93-4117(part).

27-17-203. Order from judge. The sheriff shall make no seizure unless an order from a judge of the court having jurisdiction of the cause is attached to the affidavit. The judge may sign such an order if he is satisfied:

(1) that the party seeking possession of the property has made a prima facie showing of his right to possession and the necessity for seizure at a show cause hearing before him with at least 3 days' notice to the person in possession of the property; if such person cannot be found for personal service, notice posted on the property and in three public places in the county where the property is located is sufficient service for this purpose; or

(2) that the delay caused by notice and a hearing would seriously impair the remedy sought by the party seeking possession. Evidence of such impairment must be presented in open court, and the court must set forth with specificity the reasons why such delay would seriously impair the remedy sought by the person seeking possession.

History: En. Sec. 72, p. 56, Bannack Stat.; amd. Sec. 100, p. 151, L. 1867; re-en. Sec. 117, p. 49, Cod. Stat. 1871; re-en. Sec. 155, p. 75, L. 1877; re-en. Sec. 155, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 103, L. 1885; re-en. Sec. 157, 1st Div. Comp. Stat. 1887; re-en. Sec. 841, C. Civ. Proc. 1895; re-en. Sec. 6623, Rev. C. 1907; re-en. Sec. 9221, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 510; re-en. Sec. 9221, R.C.M. 1935; amd. Sec. 1, Ch. 362, L. 1975; R.C.M. 1947, 93-4102(2).

27-17-204. Endorsement requiring sheriff to take property. The laintiff or his attorney may thereupon, by an endorsement in writing upon he affidavit, require the sheriff of the county where the property claimed nay be to take the same from the defendant.

History: En. Sec. 73, p. 56, Bannack Stat.; re-en. Sec. 101, p. 152, L. 1867; re-en. Sec. 118, p. 9, Cod. Stat. 1871; re-en. Sec. 156, p. 76, L. 1877; re-en. Sec. 156, 1st Div. Rev. Stat. 1879; re-en. ec. 158, 1st Div. Comp. Stat. 1887; re-en. Sec. 842, C. Civ. Proc. 1895; re-en. Sec. 6624, Rev. C. 907; re-en. Sec. 9222, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 511; re-en. Sec. 9222, R.C.M. 1935; .C.M. 1947, 93-4103.

27-17-205. Plaintiff's undertaking — service and execution by heriff. Upon receipt of the affidavit and notice with a written undertaking, xecuted by two or more sufficient sureties approved by the sheriff, to the ffect that they are bound to the defendant in double the value of the prop-rty, as stated in the affidavit for the prosecution of the action, and for the eturn of the property to the defendant, if return thereof be adjudged, and or the payment to him of such sum as may from any cause be recovered gainst the plaintiff, the sheriff must forthwith take the property described n the affidavit, if it be in the possession of the defendant or his agent, and etain it in his custody. He must also, without delay, serve on the defendant copy of the affidavit, notice, and undertaking by delivering the same to him ersonally, if he can be found, or to his agent from whose possession the roperty is taken or, if neither can be found, by leaving them at the usual lace of abode of either with some person of suitable age and discretion or, f neither have any known place of abode, by putting them in the nearest ost office, directed to the defendant.

History: En. Sec. 74, p. 56, Bannack Stat.; en. Sec. 102, p. 152, L. 1867; re-en. Sec. 119, p. 49, od. Stat. 1871; re-en. Sec. 157, p. 76, L. 1877; re-en. Sec. 157, 1st Div. Rev. Stat. 1879; re-en. Sec. 59, 1st Div. Comp. Stat. 1887; re-en. Sec. 843, C. Civ. Proc. 1895; re-en. Sec. 6625, Rev. C. 1907; e-en. Sec. 9223, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 512; re-en. Sec. 9223, R.C.M. 1935; R.C.M. 947, 93-4104.

27-17-206. Manner of seizure of concealed property. If the prop-rty or any part thereof be concealed in a building or enclosure, the sheriff hall publicly demand its delivery; if it be not delivered, he shall cause the uilding or enclosure to be broken open and take the property into his pos-ession and, if necessary, he may call to his aid the power of the county.

History: En. Sec. 107, p. 152, L. 1867; re-en. Sec. 124, p. 50, Cod. Stat. 1871; re-en. Sec. 166, . 79, L. 1877; re-en. Sec. 166, 1st Div. Rev. Stat. 1879; re-en. Sec. 168, 1st Div. Comp. Stat. 1887; e-en. Sec. 852, C. Civ. Proc. 1895; re-en. Sec. 6634, Rev. C. 1907; re-en. Sec. 9232, R.C.M. 1921; al. C. Civ. Proc. Sec. 517; re-en. Sec. 9232, R.C.M. 1935; R.C.M. 1947, 93-4113.

27-17-207. Seizure when part of property cannot be found. The heriff must take a less number or quantity if the whole of the property lescribed in the affidavit cannot be found.

History: En. Sec. 857, C. Civ. Proc. 1895; re-en. Sec. 6639, Rev. C. 1907; re-en. Sec. 9237, R.C.M. 921; re-en. Sec. 9237, R.C.M. 1935; R.C.M. 1947, 93-4118.

Part 3

Procedure Following Seizure by Sheriff

27-17-301. Duty of sheriff to keep and deliver property. When he sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place and deliver it to the party entitled thereto upon receiving his lawful fees for taking and his necessary expenses for keeping the same.

History: En. Sec. 108, p. 153, L. 1867; re-en. Sec. 125, p. 51, Cod. Stat. 1871; re-en. Sec. 167 p. 79, L. 1877; re-en. Sec. 167, 1st Div. Rev. Stat. 1879; re-en. Sec. 169, 1st Div. Comp. Stat. 1887 re-en. Sec. 853, C. Civ. Proc. 1895; re-en. Sec. 6635, Rev. C. 1907; re-en. Sec. 9233, R.C.M. 1921 Cal. C. Civ. Proc. Sec. 518; re-en. Sec. 9233, R.C.M. 1935; R.C.M. 1947, 93-4114.

27-17-302. Sheriff's return of execution. The sheriff shall file the notice, undertaking, and affidavit, with his proceedings thereon, with the clerk of the court in which the action is pending within 20 days after taking the property mentioned therein.

History: En. Sec. 110, p. 153, L. 1867; re-en. Sec. 127, p. 51, Cod. Stat. 1871; re-en. Sec. 169 p. 79, L. 1877; re-en. Sec. 169, 1st Div. Rev. Stat. 1879; re-en. Sec. 171, 1st Div. Comp. Stat. 1887 re-en. Sec. 855, C. Civ. Proc. 1895; re-en. Sec. 6637, Rev. C. 1907; re-en. Sec. 9235, R.C.M. 1921 Cal. C. Civ. Proc. Sec. 520; re-en. Sec. 9235, R.C.M. 1935; R.C.M. 1947, 93-4116.

27-17-303. Exception to plaintiff's sureties — justification — liability of sheriff. The defendant may, within 2 days after service of a copy of the affidavit and undertaking, give notice to the sheriff that he excepts to the sufficiency of the sureties. If he fails to do so, he shall be deemed to have waived all objections to them. When the defendant excepts the sureties must justify on notice in like manner as upon bail on arrest; and the sheriff is responsible for the sufficiency of the sureties until the objection to them is waived, as above provided, or until they justify. If the defendant except to the sureties, he cannot claim the property, as provided in 27-17-304.

History: En. Sec. 103, p. 152, L. 1867; re-en. Sec. 120, p. 50, Cod. Stat. 1871; re-en. Sec. 158 p. 76, L. 1877; re-en. Sec. 158, 1st Div. Rev. Stat. 1879; re-en. Sec. 160, 1st Div. Comp. Stat. 1887 re-en. Sec. 844, C. Civ. Proc. 1895; re-en. Sec. 6626, Rev. C. 1907; re-en. Sec. 9224, R.C.M. 1921 Cal. C. Civ. Proc. Sec. 513; re-en. Sec. 9224, R.C.M. 1935; R.C.M. 1947, 93-4105.

27-17-304. When defendant may require return of property — his undertaking. At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum as may, for any cause be recovered against the defendant.

History: En. Sec. 104, p. 152, L. 1867; re-en. Sec. 121, p. 50, Cod. Stat. 1871; re-en. Sec. 163 p. 78, L. 1877; re-en. Sec. 163, 1st Div. Rev. Stat. 1879; re-en. Sec. 165, 1st Div. Comp. Stat. 1887 re-en. Sec. 849, C. Civ. Proc. 1895; re-en. Sec. 6631, Rev. C. 1907; re-en. Sec. 9229, R.C.M. 1921 Cal. C. Civ. Proc. Sec. 514; re-en. Sec. 9229, R.C.M. 1935; R.C.M. 1947, 93-4110(part).

27-17-305. Return of part of the property. Where the plaintiff's affidavit states separately the value of one or more chattels or classes of chattels, the defendant may require, as prescribed in this chapter, the return of any or all of the chattels or classes of chattels the value of which is thus stated or of the portion thereof which has been taken.

History: En. Sec. 856, C. Civ. Proc. 1895; re-en. Sec. 6638, Rev. C. 1907; re-en. Sec. 9236, R.C.M. 1921; re-en. Sec. 9236, R.C.M. 1935; R.C.M. 1947, 93-4117(part).

27-17-306. Justification of defendant's sureties — liability of sheriff. The defendant's sureties, upon notice to the plaintiff of not less han 2 or more than 5 days, shall justify before the judge or clerk in the same manner as upon bail on arrest, and upon such justification the sheriff must deliver the property to the defendant. The sheriff shall be responsible for the defendant's sureties until they justify or until the justification is completed or expressly waived and may retain the property until that time; but f they or others in their place fail to justify at the time or place appointed, he shall deliver the property to the plaintiff.

History: En. Sec. 105, p. 152, L. 1867; re-en. Sec. 122, p. 50, Cod. Stat. 1871; re-en. Sec. 164, . 78, L. 1877; re-en. Sec. 164, 1st Div. Rev. Stat. 1879; re-en. Sec. 166, 1st Div. Comp. Stat. 1887; e-en. Sec. 850, C. Civ. Proc. 1895; re-en. Sec. 6632, Rev. C. 1907; re-en. Sec. 9230, R.C.M. 1921; al. C. Civ. Proc. Sec. 515; re-en. Sec. 9230, R.C.M. 1935; R.C.M. 1947, 93-4111.

27-17-307. Procedure for qualification and justification of sureties. The qualification of sureties and their justification shall be such as are prescribed by chapter 16 in respect to bail upon an order of arrest.

History: En. Sec. 106, p. 152, L. 1867; re-en. Sec. 123, p. 50, Cod. Stat. 1871; re-en. Sec. 165, . 78, L. 1877; re-en. Sec. 165, 1st Div. Rev. Stat. 1879; re-en. Sec. 167, 1st Div. Comp. Stat. 1887; e-en. Sec. 851, C. Civ. Proc. 1895; re-en. Sec. 6633, Rev. C. 1907; re-en. Sec. 9231, R.C.M. 1921; al. C. Civ. Proc. Sec. 516; re-en. Sec. 9231, R.C.M. 1935; R.C.M. 1947, 93-4112.

27-17-308. Delivery of property to plaintiff if not returned to defendant. If a return of the property be not required within 5 days after he taking and serving notice to the defendant, it shall be delivered to the plaintiff, except as provided in 27-17-309. If the defendant procures a return under 27-17-305, the remainder must be delivered to the plaintiff, except as s otherwise prescribed in this chapter.

History: Ap. p. Sec. 104, p. 152, L. 1867; re-en. Sec. 121, p. 50, Cod. Stat. 1871; re-en. Sec. 163, . 78, L. 1877; re-en. Sec. 163, 1st Div. Rev. Stat. 1879; re-en. Sec. 165, 1st Div. Comp. Stat. 1887; e-en. Sec. 849, C. Civ. Proc. 1895; re-en. Sec. 6631, Rev. C. 1907; re-en. Sec. 9229, R.C.M. 1921; al. C. Civ. Proc. Sec. 514; re-en. Sec. 9229, R.C.M. 1935; Sec. 93-4110, R.C.M. 1947; Ap. p. Sec. 56, C. Civ. Proc. 1895; re-en. Sec. 6638, Rev. C. 1907; re-en. Sec. 9236, R.C.M. 1921; re-en. Sec. 236, R.C.M. 1935; Sec. 93-4117, R.C.M. 1947; R.C.M. 1947, 93-4110(part), 93-4117(part).

27-17-309. Claim of property by third person — plaintiff to ndemnify sheriff. If the property taken be claimed by any other person han the defendant or his agent and such person make affidavit of his title hereto or right of the possession thereof, stating the grounds of such right r title, and serve the same upon the sheriff, the sheriff shall not be bound o keep the property or deliver it to the plaintiff unless the plaintiff, on emand of him or his agent, indemnify the sheriff against such claim by an ndertaking by two sufficient sureties, accompanied by their affidavits that hey are each worth double the value of the property, as specified in the affiavit of the plaintiff, over and above their debts and liabilities, exclusive of roperty exempt from execution, and are freeholders or householders in the ounty; and no claim to such property by any other person than the defenant or his agent shall be valid against the sheriff unless so made.

History: En. Sec. 109, p. 153, L. 1867; re-en. Sec. 126, p. 51, Cod. Stat. 1871; re-en. Sec. 168, 79, L. 1877; re-en. Sec. 168, 1st Div. Rev. Stat. 1879; re-en. Sec. 170, 1st Div. Comp. Stat. 1887; -en. Sec. 854, C. Civ. Proc. 1895; re-en. Sec. 6636, Rev. C. 1907; re-en. Sec. 9234, R.C.M. 1921; al. C. Civ. Proc. Sec. 519; re-en. Sec. 9234, R.C.M. 1935; R.C.M. 1947, 93-4115.

27-17-310. Answer of defendant claiming third person entitled to property. The defendant may, by answer, defend on the ground that a third person was entitled to the property, without connecting himself with the latter's title.

History: En. Sec. 858, C. Civ. Proc. 1895; re-en. Sec. 6640, Rev. C. 1907; re-en. Sec. 9238, R.C.M. 1921; re-en. Sec. 9238, R.C.M. 1935; R.C.M. 1947, 93-4119.

Part 4

Judgment — Return of Property

27-17-401. Form of judgment. (1) In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or for the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

(2) The judgment in an action for claim and delivery in justices' courts must be entered substantially in the form required by subsection (1).

History: (1)En. Sec. 176, p. 77, Bannack Stat.; re-en. Sec. 200, p. 174, L. 1867; re-en. Sec. 240, p. 77, Cod. Stat. 1871; re-en. Sec. 291, p. 115, L. 1877; re-en. Sec. 291, 1st Div. Rev. Stat. 1879; re-en. Sec. 303, 1st Div. Comp. Stat. 1887; re-en. Sec. 1193, C. Civ. Proc. 1895; re-en. Sec. 6803, Rev. C. 1907; re-en. Sec. 9406, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 667; re-en. Sec. 9406, R.C.M. 1935; Sec. 93-5704, R.C.M. 1947; (2)En. Sec. 612, p. 164, Bannack Stat.; re-en. Sec. 718, p. 179, Cod. Stat. 1871; re-en. Sec. 778, 1st Div. Rev. Stat. 1879; re-en. Sec. 798, 1st Div. Comp. Stat. 1887; amd. Sec. 1624, C. Civ. Proc. 1895; re-en. Sec. 7050, Rev. C. 1907; re-en. Sec. 9683, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 893; re-en. Sec. 9683, R.C.M. 1935; Sec. 93-7305, R.C.M. 1947; R.C.M. 1947, 93-5704, 93-7305(part).

27-17-402. Duty to return property in good condition. In all cases when a judgment is rendered, in an action to recover the possession of personal property, for the return thereof, or its value in case a return cannot be had, it is the duty of the party against whom such judgment shall be rendered to return the same in as good condition as the same was when possession thereof was taken by him.

History: En. Sec. 159, p. 77, L. 1877; re-en. Sec. 159, 1st Div. Rev. Stat. 1879; re-en. Sec. 161, 1st Div. Comp. Stat. 1887; re-en. Sec. 845, C. Civ. Proc. 1895; re-en. Sec. 6627, Rev. C. 1907; re-en. Sec. 9225, R.C.M. 1921; re-en. Sec. 9225, R.C.M. 1935; R.C.M. 1947, 93-4106.

27-17-403. Action for value of property and damages. In case such property, while in the possession of the party against whom such judgment shall be rendered or while unlawfully detained from the party entitled to the possession thereof, be materially injured or lessened in value by use or otherwise, then a return or offer to return shall not be deemed a compliance with the undertaking given for its return but an action may be maintained for the value thereof, as assessed by the jury or court, and damages for its detention.

History: En. Sec. 160, p. 77, L. 1877; re-en. Sec. 160, 1st Div. Rev. Stat. 1879; re-en. Sec. 162, 1st Div. Comp. Stat. 1887; re-en. Sec. 846, C. Civ. Proc. 1895; re-en. Sec. 6628, Rev. C. 1907; re-en. Sec. 9226, R.C.M. 1921; re-en. Sec. 9226, R.C.M. 1935; R.C.M. 1947, 93-4107.

27-17-404. Return of damaged property to officer for sale. In case such action to recover possession of personal property is brought against ny sheriff or other officer who may have levied upon and seized the same nder authority of any attachment or other process and judgment shall be endered in favor of such officer for the return of the property, the party gainst whom such judgment is rendered may nevertheless make return of aid property, notwithstanding the same may have been injured or lessened n value, and thereupon it is the duty of such officer to immediately advertise the same for sale as in cases of sales of property under execution and pply the proceeds of the sale thereof, after paying the costs, towards the ayment and satisfaction of any judgment that may have been rendered.

History: En. Sec. 161, p. 77, L. 1877; re-en. Sec. 161, 1st Div. Rev. Stat. 1879; re-en. Sec. 163, st Div. Comp. Stat. 1887; re-en. Sec. 847, C. Civ. Proc. 1895; re-en. Sec. 6629, Rev. C. 1907; re-en. ec. 9227, R.C.M. 1921; re-en. Sec. 9227, R.C.M. 1935; R.C.M. 1947, 93-4108.

27-17-405. Continuing liability of sureties. Such second taking of uch property, referred to in 27-17-404, does not release or discharge the ureties on any undertaking given for the return of such property, but an ction may be maintained on such undertaking and recovery thereon had nless the property shall have been actually returned in accordance with the udgment rendered.

History: En. Sec. 162, p. 77, L. 1877; re-en. Sec. 162, 1st Div. Rev. Stat. 1879; re-en. Sec. 164, st Div. Comp. Stat. 1887; re-en. Sec. 848, C. Civ. Proc. 1895; re-en. Sec. 6630, Rev. C. 1907; re-en. ec. 9228, R.C.M. 1921; re-en. Sec. 9228, R.C.M. 1935; R.C.M. 1947, 93-4109.

CHAPTER 18

PREJUDGMENT ATTACHMENT

Part 1 — General Provisions

ection

7-18-101. Cases in which property may be attached.
7-18-102. What property subject to attachment.
Sections 27-18-103 through 27-18-110 reserved.
7-18-111. Court record not be to open to public until writ returned.
7-18-112. Attachment book to be kept by county clerk.

Part 2 — Procedure for Obtaining Writ

7-18-201. Time for attaching property.
7-18-202. Plaintiff's affidavit.
7-18-203. Affidavit requirements when debt not yet due.
7-18-204. Plaintiff's undertaking.
7-18-205. When judge may issue writ — notice.
7-18-206. Issuance of several writs to different counties.
7-18-207. Alias writs.

Part 3 — Writ of Attachment—Execution

7-18-301. Form and content of writ — defendant's undertaking to prevent levy.
7-18-302. Filing of undertaking — sheriff's liability.
7-18-303. Order of execution when several writs against same defendant.
7-18-304. When sheriff may require written specification of property to be levied upon.
7-18-305. Security for sheriff's costs.
7-18-306. Sheriff's duty to execute.
7-18-307. Lien of attachment.
7-18-308. Attachment not released by defendant's death.

Part 4 — Manner of Attaching Property

27-18-401. Sheriff to take custody of books and evidences of title.
27-18-402. Real property in defendant's name.
27-18-403. Real property in another's name.
27-18-404. Personal property capable of manual delivery.
27-18-405. Debts, credits, and personal property in control of third person or not capable of manual delivery.
27-18-406. Money, credits, or other property in control of public officer or board.
27-18-407. Liability of third persons controlling property or debts and served by sheriff.
27-18-408. Judgments.
27-18-409. Investment securities and stocks.
27-18-410. Corporate stock — service on secretary of state.
27-18-411. Duty of secretary of state — fees.
27-18-412. Interest of defendant in decedent's estate.
27-18-413. Personal property subject to a security interest.
27-18-414. Duty of secured party.

Part 5 — Proceedings in Aid of Attachment

27-18-501. Examination under oath of defendant or person controlling property or debts — order that property be delivered.
27-18-502. Person holding property to give sheriff certificate of defendant's interest.
27-18-503. Order to person holding property to submit to examination under oath.

Part 6 — Procedure Following Attachment—Return of Writ

27-18-601. Sheriff to retain nonperishable attached property and proceeds of sales.
27-18-602. Claim of attached property by third person — plaintiff to indemnify sheriff.
27-18-603. Sheriff's inventory of attached property — cooperation of persons controlling credits or debts.
27-18-604. Sheriff's return of writ.

Part 7 — Methods of Defending Against Attachment

27-18-701. Right to hearing following seizure without notice — notice of right.
27-18-702. When writ quashed.
Sections 27-18-703 through 27-18-710 reserved.
27-18-711. Motion to discharge writ improperly issued.
27-18-712. Use of affidavits to support or oppose motion.
27-18-713. Decision of court.
Section 27-18-714 reserved.
27-18-715. Exception to plaintiff's sureties.
27-18-716. Justification of sureties.
Sections 27-18-717 through 27-18-720 reserved.
27-18-721. Proceedings to release attachment.
27-18-722. Defendant's undertaking — justification of sureties.
Sections 27-18-723 and 27-18-724 reserved.
27-18-725. Motion to vacate or modify writ or increase security.
27-18-726. Proceedings on motion.
Sections 27-18-727 through 27-18-730 reserved.
27-18-731. Filing of order discharging or releasing attachment of real property.
27-18-732. Release of attachment of real property by clerk when action not prosecuted — filing.

Part 8 — Sale of Attached Property

27-18-801. Sheriff to sell perishable property.
27-18-802. Authority of court to order sale of property.
27-18-803. Notice of application for order to sell.
27-18-804. Sale of property subject to a security interest — disposition of proceeds, security agreement.

Part 9 — Judgment and Subsequent Procedure

7-18-901. Judgment when debt not yet due.
7-18-902. Procedure when defendant recovers judgment.
7-18-903. Judgment for plaintiff — disposition of attached property and proceeds of sales.
7-18-904. Delivery of excess property and proceeds to defendant.
7-18-905. Execution of balance due on judgment.
7-18-906. Procedure when execution returned unsatisfied.

Parts 10 through 14 reserved

Part 15 — Attachment in Justice's Court

7-18-1501. Justice's authority to issue writ.
7-18-1502. Plaintiff's undertaking.
7-18-1503. Exception to sureties — justification.
7-18-1504. Form and content of writ — defendant's undertaking to prevent levy.
7-18-1505. Security for sheriff's costs.
7-18-1506. Applicability of procedure in district court.

Part 1

General Provisions

27-18-101. Cases in which property may be attached. (1) Prop-rty may be attached in:

(a) an action upon a contract, express or implied, for the direct payment f money where the contract:

(i) is not secured by any mortgage or lien upon real property; or

(ii) is originally secured and such security has, without any act of the laintiff or the person to whom the security was given, become valueless; and

(b) an action based upon a statutory stockholders' liability.

(2) Attachment may not issue if the defendant gives security to pay the ıdgment.

History: En. Sec. 890, C. Civ. Proc. 1895; re-en. Sec. 6656, Rev. C. 1907; re-en. Sec. 9256, R.C.M. 21; Cal. C. Civ. Proc. Sec. 537; amd. Sec. 1, Ch. 82, L. 1931; re-en. Sec. 9256, R.C.M. 1935; amd. ec. 11-159, Ch. 264, L. 1963; amd. Sec. 1, Ch. 299, L. 1977; R.C.M. 1947, 93-4301(2), (3).

27-18-102. What property subject to attachment. (1) Except as rovided in subsection (2), the rights or shares which the defendant has in ie stock of any corporation or company, together with the interest and profs thereon, all debts due the defendant, and all other property in this state the defendant not exempt from execution may be attached and, if judgent is recovered, sold to satisfy the judgment and execution. Property cempt from execution is exempt from attachment.

(2) In any action in which the amount sued for is $10 or less, the wages ıd earnings of the debtor or defendant for his personal services rendered at ıy time within 30 days before the commencement of the action are exempt om attachment.

History: (1)En. Sec. 95, p. 61, Bannack Stat.; amd. Sec. 124, p. 157, L. 1867; re-en. Sec. 141, p. , Cod. Stat. 1871; re-en. Sec. 183, p. 84, L. 1877; re-en. Sec. 183, 1st Div. Rev. Stat. 1879; re-en. c. 185, 1st Div. Comp. Stat. 1887; re-en. Sec. 894, C. Civ. Proc. 1895; re-en. Sec. 6661, Rev. C. 07; re-en. Sec. 9261, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 541; re-en. Sec. 9261, R.C.M. 1935; Sec.

93-4306, R.C.M. 1947; (2)En. Sec. 1, Ch. 49, Ex. L. 1933; re-en. Sec. 9429.1, R.C.M. 1935; Sec. 93-5817, R.C.M. 1947; R.C.M. 1947, 93-4306, 93-5817; amd. Sec. 39, Ch. 12, L. 1979.

27-18-103 through 27-18-110 reserved.

27-18-111. Court record not to be open to public until writ returned. In cases of attachment, the clerk of the court with whom the complaint is filed must not make public the fact of the filing of the complaint or the issuing of such attachment until after the filing of return of service of attachment.

History: En. Sec. 1136, Pol. C. 1895; re-en. Sec. 438, Rev. C. 1907; re-en. Sec. 455, R.C.M. 1921; Cal. Pol. C. Sec. 1032; re-en. Sec. 455, R.C.M. 1935; amd. Sec. 1, Ch. 112, L. 1945; R.C.M. 1947, 59-512(part).

27-18-112. Attachment book to be kept by county clerk. There must be kept in the office of the county clerk of each county a book called "attachment book", in which must be entered by such clerk, in alphabetical order, the names of all persons against whom any writ or notice of attachment has been filed in his office. There must also be entered in said book the time such writ or notice was filed. Such entry must be made under an appropriate head for that purpose.

History: En. Sec. 203, p. 89, L. 1877; re-en. Sec. 203, 1st Div. Rev. Stat. 1879; re-en. Sec. 205, 1st Div. Comp. Stat. 1887; amd. Sec. 924, C. Civ. Proc. 1895; re-en. Sec. 6691, Rev. C. 1907; re-en. Sec. 9293, R.C.M. 1921; re-en. Sec. 9293, R.C.M. 1935; R.C.M. 1947, 93-4340.

Part 2

Procedure for Obtaining Writ

27-18-201. Time for attaching property. A plaintiff, at the time of issuing the summons or at any time afterward, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered.

History: En. Sec. 890, C. Civ. Proc. 1895; re-en. Sec. 6656, Rev. C. 1907; re-en. Sec. 9256, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 537; amd. Sec. 1, Ch. 82, L. 1931; re-en. Sec. 9256, R.C.M. 1935; amd. Sec. 11-159, Ch. 264, L. 1963; amd. Sec. 1, Ch. 299, L. 1977; R.C.M. 1947, 93-4301(1).

27-18-202. Plaintiff's affidavit. When attachment of a defendant's property is sought, an affidavit must be made by the plaintiff or someone in his behalf stating:

(1) facts which show the defendant is indebted to the plaintiff in the manner specified in 27-18-101(1);

(2) that the attachment is not sought to hinder, delay, or defraud any creditor of the defendant;

(3) facts creating a reasonable belief that the defendant:

(a) is leaving or about to leave this state taking with him property, money, or other effects which might be subjected to payment of the debt;

(b) is disposing or about to dispose of his property which would be subject to execution;

(c) has the power to dispose of or conceal or remove from the state property which would be subject to execution; or

(d) is likely to suffer liens or encumbrances on his property which would be subject to execution;

(4) a particular description and the actual value of the property to be attached.

History: En. 93-4302.1 by Sec. 2, Ch. 299, L. 1977; R.C.M. 1947, 93-4302.1.

27-18-203. Affidavit requirements when debt not yet due. Actions may be commenced and writs of attachment issued upon any debt for the payment of money or specific property before the same shall have become due when it shall appear by the affidavit, in addition to what is required in 27-18-202:

(1) that the defendant is leaving or is about to leave this state, taking with him property, moneys, or other effects which might be subjected to the payment of the debt, for the purpose of defrauding his creditors; or

(2) that the defendant is disposing of his property or is about to dispose of his property, subject to execution, for the purpose of defrauding his creditors.

History: En. Sec. 1, p. 141, L. 1899; re-en. Sec. 6658, Rev. C. 1907; amd. Sec. 1, Ch. 14, L. 1911; e-en. Sec. 9258, R.C.M. 1921; re-en. Sec. 9258, R.C.M. 1935; R.C.M. 1947, 93-4303(part).

27-18-204. Plaintiff's undertaking. Before issuing the writ, the court must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties to be approved by the court, in a sum not less than double the amount claimed by the plaintiff if such amount be $1,000 or under or, in case the amount so claimed by plaintiff shall exceed $1,000, then in a sum equal to such amount. In no case shall an undertaking be required exceeding in amount the sum of $20,000. The condition of such undertaking shall be to the effect that if the defendant recovers judgment or if the court finally decides that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant and all damages he may sustain by reason of the issuing of the attachment, not exceeding the sum specified in the undertaking.

History: En. Sec. 93, p. 61, Bannack Stat.; amd. Sec. 122, p. 156, L. 1867; amd. Sec. 12, p. 65, L. 1869; amd. Sec. 7, p. 75, L. 1870; amd. Sec. 138, p. 54, Cod. Stat. 1871; amd. Sec. 20, p. 56, L. 874; amd. Sec. 180, p. 82, L. 1877; re-en. Sec. 180, 1st Div. Rev. Stat. 1879; amd. Sec. 6, p. 9, L. 881; re-en. Sec. 182, 1st Div. Comp. Stat. 1887; en. Sec. 892, C. Civ. Proc. 1895; re-en. Sec. 6659, Rev. C. 1907; re-en. Sec. 9259, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 539; re-en. Sec. 9259, R.C.M. 935; amd. Sec. 1, Ch. 15, L. 1951; amd. Sec. 1, Ch. 303, L. 1967; amd. Sec. 3, Ch. 299, L. 1977; R.C.M. 1947, 93-4304(1).

27-18-205. When judge may issue writ — notice. A judge of a court having jurisdiction of the cause may issue a writ of attachment when:

(1) he has received the affidavit described in 27-18-202;

(2) he has approved the undertaking required in 27-18-204; and

(3) the party seeking attachment has made a prima facie showing:

(a) in the case of real property, of his right to attachment and the necessity for seizure;

(b) in the case of personal property:

(i) of his right to attachment and the necessity for seizure at a show cause hearing before the court with at least 3 days' notice to the defendant; if the defendant cannot be found for personal service, notice shall be posted on the property and in three public places in the county where the property is located; or

(ii) of his right to attachment and the necessity for seizure and that the delay caused by notice and a hearing would seriously impair the remedy sought by the party seeking possession. Evidence of such impairment must be presented in open court, and the court must set forth with specificity the reasons why such delay would seriously impair the remedy sought by the person seeking attachment.

History: **En. 93-4304.1 by Sec. 4, Ch. 299, L. 1977; R.C.M. 1947, 93-4304.1.**

27-18-206. Issuance of several writs to different counties. Several writs may be issued at the same time to the sheriffs of different counties.

History: **En. Sec. 94, p. 61, Bannack Stat.; amd. Sec. 123, p. 156, L. 1867; re-en. Sec. 140, p. 55, Cod. Stat. 1871; amd. Sec. 1, p. 47, L. 1874; amd. Sec. 182, p. 83, L. 1877; re-en. Sec. 182, 1st Div. Rev. Stat. 1879; re-en. Sec. 184, 1st Div. Comp. Stat. 1887; re-en. Sec. 893, C. Civ. Proc. 1895; en. Sec. 1, p. 140, L. 1899; re-en. Sec. 6660, Rev. C. 1907; re-en. Sec. 9260, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 540; re-en. Sec. 9260, R.C.M. 1935; R.C.M. 1947, 93-4305(part).**

27-18-207. Alias writs. Whenever a writ of attachment has been lost or whenever it shall appear from the sheriff's return thereof that no property of the party or parties defendant has been levied upon or that the levy made is insufficient to satisfy the full amount of the plaintiff's demand or if, for any reason, the levy of the original writ is void or ineffective, the clerk of the court, upon written demand of the plaintiff or his attorney, shall issue an alias writ in the same form as the original, but no such alias writ shall be issued in an action after the commencement of the trial thereof. No new or additional affidavit or undertaking on attachment shall be required for the issuance of an alias writ. Alias writs of attachment may be issued to the sheriffs of different counties.

History: **En. Sec. 1, Ch. 121, L. 1921; re-en. Sec. 9275, R.C.M. 1921; re-en. Sec. 9275, R.C.M. 1935; R.C.M. 1947, 93-4322.**

Part 3

Writ of Attachment — Execution

27-18-301. Form and content of writ — defendant's undertaking to prevent levy. (1) The writ must be directed to the sheriff of any county in which property of such defendant may be and must require him to:

(a) attach and safely keep all the property of such defendant within his county, not exempt from attachment, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint; or

(b) if the defendant gives him security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, take such undertaking.

(2) The undertaking must be to the plaintiff in the action and must be approved in writing on the back thereof by the plaintiff or his attorney or,

pon their refusal, by the judge of the district court of the same county as he residence of the sheriff.

History: En. Sec. 94, p. 61, Bannack Stat.; amd. Sec. 123, p. 156, L. 1867; re-en. Sec. 140, p. 55, od. Stat. 1871; amd. Sec. 1, p. 47, L. 1874; amd. Sec. 182, p. 83, L. 1877; re-en. Sec. 182, 1st Div. ev. Stat. 1879; re-en. Sec. 184, 1st Div. Comp. Stat. 1887; re-en. Sec. 893, C. Civ. Proc. 1895; en. ec. 1, p. 140, L. 1899; re-en. Sec. 6660, Rev. C. 1907; re-en. Sec. 9260, R.C.M. 1921; Cal. C. Civ. roc. Sec. 540; re-en. Sec. 9260, R.C.M. 1935; R.C.M. 1947, 93-4305(part); amd. Sec. 40, Ch. 12, L. 979.

27-18-302. Filing of undertaking — sheriff's liability. The sheriff hall thereupon file said undertaking with the clerk of the district court out f which said writ of attachment emanates, and such sheriff shall thereupon ease to be liable under said writ, and any and all actions on such undertaking shall be against the obligors named in such undertaking.

History: En. Sec. 94, p. 61, Bannack Stat.; amd. Sec. 123, p. 156, L. 1867; re-en. Sec. 140, p. 55, od. Stat. 1871; amd. Sec. 1, p. 47, L. 1874; amd. Sec. 182, p. 83, L. 1877; re-en. Sec. 182, 1st Div. ev. Stat. 1879; re-en. Sec. 184, 1st Div. Comp. Stat. 1887; re-en. Sec. 893, C. Civ. Proc. 1895; en. ec. 1, p. 140, L. 1899; re-en. Sec. 6660, Rev. C. 1907; re-en. Sec. 9260, R.C.M. 1921; Cal. C. Civ. roc. Sec. 540; re-en. Sec. 9260, R.C.M. 1935; R.C.M. 1947, 93-4305(part).

27-18-303. Order of execution when several writs against ame defendant. The sheriff must endorse upon each writ of attachment eceived by him the time when the same was received, specifying the day, our, and minute. The writ of attachment first placed in the hands of the heriff must be executed first, and when there are several writs against the ame defendant, they must be executed in the order in which they were eceived by the sheriff.

History: En. Sec. 160, p. 59, Cod. Stat. 1871; re-en. Sec. 202, p. 89, L. 1877; re-en. Sec. 202, 1st iv. Rev. Stat. 1879; re-en. Sec. 204, 1st Div. Comp. Stat. 1887; amd. Sec. 920, C. Civ. Proc. 1895; e-en. Sec. 6687, Rev. C. 1907; re-en. Sec. 9288, R.C.M. 1921; re-en. Sec. 9288, R.C.M. 1935; R.C.M. 947, 93-4335(part).

27-18-304. When sheriff may require written specification of roperty to be levied upon. No written specification of property to be evied upon may be required by the sheriff, except as to property referred o in 27-18-403 and 27-18-405(2).

History: En. Sec. 160, p. 59, Cod. Stat. 1871; re-en. Sec. 202, p. 89, L. 1877; re-en. Sec. 202, 1st iv. Rev. Stat. 1879; re-en. Sec. 204, 1st Div. Comp. Stat. 1887; amd. Sec. 920, C. Civ. Proc. 1895; e-en. Sec. 6687, Rev. C. 1907; re-en. Sec. 9288, R.C.M. 1921; re-en. Sec. 9288, R.C.M. 1935; R.C.M. 947, 93-4335(part); amd. Sec. 41, Ch. 12, L. 1979.

27-18-305. Security for sheriff's costs. If the sheriff will incur subtantial costs in transporting, keeping, or storing the property seized, the arty requesting service of a writ of attachment shall provide a bond or other ecurity to pay for all costs which may be incurred as a result of the service f such writ.

History: En. Sec. 4393, Pol. C. 1895; re-en. Sec. 3022, Rev. C. 1907; re-en. Sec. 4786, R.C.M. 921; Cal. Pol. C. Sec. 4185; re-en. Sec. 4786, R.C.M. 1935; amd. Sec. 1, Ch. 426, L. 1977; R.C.M. 947, 16-2714(part).

27-18-306. Sheriff's duty to execute. The sheriff to whom the writ s directed and delivered must execute the same without delay and, if the ndertaking mentioned in 27-18-301 be not given, as provided in part 4. He nay levy, from time to time and as often as is necessary, until the amount for which it was issued has been secured. In no case shall the sheriff attacl more property than appears necessary to satisfy the plaintiff's demand.

History: Ap. p. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p 55, Cod. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd Sec. 1, p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895 amd. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en Sec. 9262, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 542; amd. Sec. 1, Ch. 71, L. 1931; re-en. Sec. 9262 R.C.M. 1935; amd. Sec. 11-161, Ch. 264, L. 1963; Sec. 93-4307, R.C.M. 1947; Ap. p. Sec. 898, C Civ. Proc. 1895; re-en. Sec. 6665, Rev. C. 1907; re-en. Sec. 9265, R.C.M. 1921; re-en. Sec. 9265 R.C.M. 1935; Sec. 93-4312, R.C.M. 1947; Ap. p. Sec. 94, p. 61, Bannack Stat.; amd. Sec. 123, p. 156 L. 1867; re-en. Sec. 140, p. 55, Cod. Stat. 1871; amd. Sec. 1, p. 47, L. 1874; amd. Sec. 182, p. 83 L. 1877; re-en. Sec. 182, 1st Div. Rev. Stat. 1879; re-en. Sec. 184, 1st Div. Comp. Stat. 1887; re-en Sec. 893, C. Civ. Proc. 1895; en. Sec. 1, p. 140, L. 1899; re-en. Sec. 6660, Rev. C. 1907; re-en. Sec 9260, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 540; re-en. Sec. 9260, R.C.M. 1935; R.C.M. 1947 93-4305(part), 93-4307(part), 93-4312(part).

27-18-307. Lien of attachment. All liens by attachment shall accrue at the time the property of the defendant shall be attached by the officer charged with the execution of the writ, in the order in which the writs are levied, and said lien shall not be affected by any subsequent attachment or by any judgment obtained subsequent thereto.

History: En. Sec. 160, p. 59, Cod. Stat. 1871; re-en. Sec. 202, p. 89, L. 1877; re-en. Sec. 202, 1st Div. Rev. Stat. 1879; re-en. Sec. 204, 1st Div. Comp. Stat. 1887; amd. Sec. 920, C. Civ. Proc. 1895; re-en. Sec. 6687, Rev. C. 1907; re-en. Sec. 9288, R.C.M. 1921; re-en. Sec. 9288, R.C.M. 1935; R.C.M. 1947, 93-4335(part).

27-18-308. Attachment not released by defendant's death. The death of the defendant does not release the attached property, and a lien of the attachment may be enforced as in the case of other liens.

History: En. Sec. 907, C. Civ. Proc. 1895; re-en. Sec. 6674, Rev. C. 1907; re-en. Sec. 9274, R.C.M. 1921; re-en. Sec. 9274, R.C.M. 1935; R.C.M. 1947, 93-4321.

Part 4

Manner of Attaching Property

27-18-401. Sheriff to take custody of books and evidences of title. The sheriff must take into his custody all books of account, vouchers, and other papers relating to the personal property attached and all evidences of the defendant's title to the real property attached, which he must safely keep.

History: En. Sec. 898, C. Civ. Proc. 1895; re-en. Sec. 6665, Rev. C. 1907; re-en. Sec. 9265, R.C.M. 1921; re-en. Sec. 9265, R.C.M. 1935; R.C.M. 1947, 93-4312(part).

27-18-402. Real property in defendant's name. Real property standing upon the records of the county in the name of the defendant must be attached by filing with the county clerk a copy of the writ, together with the description of the property attached and a notice that it is attached.

History: En. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 55, Cod. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; amd. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. Sec. 9262, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 542; amd. Sec. 1, Ch. 71, L. 1931; re-en. Sec. 9262, R.C.M. 1935; amd. Sec. 11-161, Ch. 264, L. 1963; R.C.M. 1947, 93-4307(1).

27-18-403. Real property in another's name. Real property or an nterest therein belonging to the defendant and held by any other person or tanding on the records of the county in the name of any other person must e attached by filing with the county clerk a copy of the writ, together with description of the property and a notice that such real property and any nterest of the defendant therein, held by or standing in the name of such ther person (naming him), are attached. The county clerk must index such ttachment when filed in the names both of the defendant and of the person y whom the property is held or in whose name it stands on the record.

History: En. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 55, od. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. Sec. , p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; md. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. ec. 9262, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 542; amd. Sec. 1, Ch. 71, L. 1931; re-en. Sec. 9262, .C.M. 1935; amd. Sec. 11-161, Ch. 264, L. 1963; R.C.M. 1947, 93-4307(2).

27-18-404. Personal property capable of manual delivery. Peronal property capable of manual delivery must be attached by taking it into ustody, except in cases in which personal property capable of manual delivry is in the possession of a third person, and such personal property, so in he possession of a third person, may be attached in the same manner as ebts or credits and other personal property not capable of manual delivery, s hereinafter provided.

History: En. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 55, od. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. Sec. , p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; md. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. ec. 9262, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 542; amd. Sec. 1, Ch. 71, L. 1931; re-en. Sec. 9262, .C.M. 1935; amd. Sec. 11-161, Ch. 264, L. 1963; R.C.M. 1947, 93-4307(3).

27-18-405. Debts, credits, and personal property in control of hird person or not capable of manual delivery. (1) Debts or credits nd personal property not capable of manual delivery and personal property n the possession of a third person must be attached by leaving with the erson owing such debt or having in his possession or under his control such redits and personal property or with his agent a copy of the writ and a otice that the debts owing by him to the defendant or the credits and other ersonal property in his possession or under his control, belonging to the efendant, are attached in pursuance of such writ.

(2) Upon receiving information in writing from the plaintiff or his attorey that any person has in his possession or under his control any credits or ther personal property belonging to the defendant or is owing any debt to he defendant, the sheriff must serve upon such person a copy of the writ nd a notice that such credits or other property or debts, as the case may e, are attached in pursuance of said writ.

(3) Debts and credits attached may be collected by the sheriff if the same an be done without suit. The sheriff's receipt is a sufficient discharge for the mount paid.

History: (1)En. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 5, Cod. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. ec. 1, p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; md. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. ec. 9262, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 542; amd. Sec. 1, Ch. 71, L. 1931; re-en. Sec. 9262, R.C.M. 1935; amd. Sec. 11-161, Ch. 264, L. 1963; Sec. 93-4307, R.C.M. 1947; (2)En. Sec. 97, p. 62 Bannack Stat.; re-en. Sec. 126, p. 157, L. 1867; re-en. Sec. 144, p. 56, Cod. Stat. 1871; re-en. Sec 186, p. 85, L. 1877; re-en. Sec. 186, 1st Div. Rev. Stat. 1879; re-en. Sec. 188, 1st Div. Comp. Stat 1887; re-en. Sec. 899, C. Civ. Proc. 1895; re-en. Sec. 6666, Rev. C. 1907; re-en. Sec. 9266, R.C.M 1921; Cal. C. Civ. Proc. Sec. 543; re-en. Sec. 9266, R.C.M. 1935; Sec. 93-4313, R.C.M. 1947; (3)En Sec. 101, p. 63, Bannack Stat.; re-en. Sec. 130, p. 158, L. 1867; re-en. Sec. 148, p. 57, Cod. Stat 1871; re-en. Sec. 190, p. 86, L. 1877; re-en. Sec. 190, 1st Div. Rev. Stat. 1879; re-en. Sec. 192, 1s Div. Comp. Stat. 1887; re-en. Sec. 903, C. Civ. Proc. 1895; re-en. Sec. 6670, Rev. C. 1907; re-en. Sec 9270, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 547; re-en. Sec. 9270, R.C.M. 1935; Sec. 93-4317, R.C.M 1947; R.C.M. 1947, 93-4307(5), 93-4313, 93-4317(part).

27-18-406. Money, credits, or other property in control of public officer or board. Money, credits, or other property belonging to or due and owing to another, in the possession of or under the control of a public officer or board, including all officers or boards of a county, municipal corporation, and school district or state board or state government, may be attached or garnished while in such possession or under such control by making service, as provided in this part, upon the clerk of the county or chairman of the board of county commissioners, the city clerk or mayor of a municipal corporation, or the clerk of the board of school trustees or chairman of such board, as the case may be.

History: En. Sec. 1, p. 159, L. 1901; re-en. Sec. 6692, Rev. C. 1907; re-en. Sec. 9294, R.C.M. 1921; re-en. Sec. 9294, R.C.M. 1935; R.C.M. 1947, 93-4341.

27-18-407. Liability of third persons controlling property or debts and served by sheriff. All persons having in their possession or under their control any credits or other personal property belonging to the defendant or owing any debts to the defendant at the time of service upon them of a copy of the writ and notice shall be, unless such property be delivered up or transferred or such debts be paid to the sheriff, liable to the plaintiff for the amount of such credits, property, or debts until the attachment be discharged or any judgment recovered by him be satisfied.

History: En. Sec. 98, p. 62, Bannack Stat.; re-en. Sec. 127, p. 157, L. 1867; re-en. Sec. 145, p. 56, Cod. Stat. 1871; re-en. Sec. 187, p. 85, L. 1877; re-en. Sec. 187, 1st Div. Rev. Stat. 1879; re-en. Sec. 189, 1st Div. Comp. Stat. 1887; re-en. Sec. 900, C. Civ. Proc. 1895; re-en. Sec. 6667, Rev. C. 1907; re-en. Sec. 9267, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 544; re-en. Sec. 9267, R.C.M. 1935; R.C.M. 1947, 93-4314.

27-18-408. Judgments. Judgments standing in favor of and in the name of the defendant upon the records of the clerk of the district court must be attached by leaving with the said clerk of the district court a copy of the writ and a notice stating that the said judgment is attached in pursuance of such writ. The clerk of the district court must index and keep a record of all attachments of judgments thereunder, and such attachment is binding on the judgment creditor.

History: En. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 55, Cod. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; amd. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. Sec. 9262, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 542; amd. Sec. 1, Ch. 71, L. 1931; re-en. Sec. 9262, R.C.M. 1935; amd. Sec. 11-161, Ch. 264, L. 1963; R.C.M. 1947, 93-4307(6).

27-18-409. Investment securities and stocks. Investment securities, as defined in the Uniform Commercial Code, may be attached or levied upon only by seizure by the officer making the attachment or levy; provided hat such a security which has been surrendered to the issuer may be ttached or levied upon by leaving with the president or other head of the ame or the secretary, cashier, or other managing agent thereof a copy of the rit and a notice stating that the security of the defendant is attached in ursuance of such writ. Stocks or shares or interest in stocks or shares of any orporation or company, other than such investment securities, may be ttached either by seizure or by leaving with the president or other head of he same or the secretary, cashier, or other managing agent thereof a copy f the writ and a notice stating that the stock or interest of the defendant s attached in pursuance of such writ.

History: **En. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 55, od. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. Sec. , p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; md. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. ec. 9262, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 542; amd. Sec. 1, Ch. 71, L. 1931; re-en. Sec. 9262, .C.M. 1935; amd. Sec. 11-161, Ch. 264, L. 1963; R.C.M. 1947, 93-4307(4).**

27-18-410. Corporate stock — service on secretary of state. In ddition to the method prescribed in 27-18-409 for attaching stock or shares r interest therein of any corporation or company, if the president or other ead of the same or the secretary, cashier, or other managing agent thereof oes not live or cannot be found in Montana and an affidavit is filed in the ffice of the clerk of the court in which the action is pending setting forth hat such officer or agent does not live or cannot be found in Montana, the lerk shall make an order directing the writ to be served upon the secretary f state of Montana or, in his absence from his office, upon the deputy secreary of state. When such order has been made, the writ of attachment shall e served upon the secretary of state or deputy secretary of state by leaving ith him a copy of the writ and a notice that the stock or shares or interest herein of such corporation or company belonging to the defendant is ttached in pursuance of the writ.

History: **En. Sec. 1, Ch. 128, L. 1937; R.C.M. 1947, 93-4308; amd. Sec. 42, Ch. 12, L. 1979.**

27-18-411. Duty of secretary of state — fees. (1) Upon such serice being so made upon the secretary of state or his deputy, the secretary f state or his deputy shall promptly mail the copy of the writ, notice, and opy of said order by registered or certified mail to the address of such cororation at its principal home office, as shown by the papers on file in the ffice of secretary of state, and shall make out and mail to the clerk of the ourt in which the action is pending a certificate of such mailing, which shall ave attached thereto the registry receipt for such letter, that such attachment so made upon the secretary of state as herein provided shall be effecive and the said stock or shares or the interest therein of the defendant hall be attached upon the service of the writ, as herein provided.

(2) At the time of the service of said writ, there shall be paid to the ecretary of state a fee of $2, which shall be by him paid into the state treasry and which may be taxed as cost by the plaintiff.

History: **En. Sec. 2, Ch. 128, L. 1937; R.C.M. 1947, 93-4309.**

27-18-412. Interest of defendant in decedent's estate. The interst of a defendant in personal property belonging to the estate of a decedent, whether as heir, legatee, or devisee, may be attached by serving the personal representative of the decedent with a copy of the writ and a notice that said interest is attached. Such attachment shall not impair the powers of the representative over the property for the purposes of administration. A copy of said writ of attachment and of said notice shall also be filed in the office of the clerk of the court in which said estate is being administered, and the personal representative shall report such attachment to the court when any petition for distribution is filed; and in the decree made upon such petition, distribution shall be ordered to such heir, legatee, or devisee, but delivery of such property shall be ordered to the officer making the levy, subject to the claim of such heir, legatee, or devisee or any person claiming under him. The property shall not be delivered to the officer making the levy until the decree distributing such interest has become final.

History: En. Sec. 96, p. 61, Bannack Stat.; amd. Sec. 125, p. 157, L. 1867; amd. Sec. 142, p. 55, Cod. Stat. 1871; re-en. Sec. 184, p. 84, L. 1877; re-en. Sec. 184, 1st Div. Rev. Stat. 1879; amd. Sec. 1, p. 113, L. 1885; re-en. Sec. 186, 1st Div. Comp. Stat. 1887; amd. Sec. 895, C. Civ. Proc. 1895; amd. Sec. 1, p. 139, L. 1899; re-en. Sec. 6662, Rev. C. 1907; amd. Sec. 1, Ch. 85, L. 1911; re-en. Sec. 9262, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 542; amd. Sec. 1, Ch. 71, L. 1931; re-en. Sec. 9262, R.C.M. 1935; amd. Sec. 11-161, Ch. 264, L. 1963; R.C.M. 1947, 93-4307(7).

27-18-413. Personal property subject to a security interest. Personal property subject to a security interest may be taken on attachment issued at the suit of a creditor (other than the secured party) of the debtor under the security agreement; but before the property is taken, the officer levying the writ must pay or tender to the secured party the amount of the security agreement debt and interest or must deposit the same with the county treasurer of the county in which the financing statement covering the security agreement is filed if such statement is filed with a county clerk and recorder or, if such statement is filed with another filing officer pursuant to law, with such other filing officer, payable to the order of the secured party.

History: En. Sec. 1, Ch. 111, L. 1921; re-en. Sec. 9291, R.C.M. 1921; re-en. Sec. 9291, R.C.M. 1935; amd. Sec. 11-162, Ch. 264, L. 1963; R.C.M. 1947, 93-4338(part); amd. Sec. 43, Ch. 12, L. 1979.

27-18-414. Duty of secured party. (1) The secured party under any security agreement of record shall, upon 15 days' notice in writing served upon him in person by any creditor of the debtor seeking to satisfy a demand of such creditor against the debtor, be required to make and file in the office of the county clerk and recorder or other filing officer with whom the financing statement covering the security agreement is filed an affidavit showing the amount of the indebtedness then actually due and owing to the secured party; and such affidavit shall state the amount of the original obligation for which the security agreement was given as security, all additional advancement of money or property on the principal obligation since the date of the execution of the security agreement, all payments of whatsoever kind, whether on principal or interest, made by the debtor to the date of the execution of such affidavit by the secured party, and the balance then remaining due and unpaid to the secured party. If, within 15 days from the service of any such demand in writing on the secured party by any creditor of the debtor, the secured party shall fail, refuse, or neglect to file the affidavit herein required, the security agreement shall be of no force or effect as against such creditor upon the seizure of any such personal property on attachment.

(2) In the event the amount shown to be due is paid to the county treas- rer or to a filing officer, as aforesaid, or to the secured party in satisfaction f the security agreement by any attaching creditor against the debtor, the ecured party shall be required to surrender to the county treasurer or such ling officer the security agreement and any note or other evidence of ndebtedness secured thereby, which security agreement or other evidence of ndebtedness shall be delivered by the secured party, county treasurer, or ling officer to the attaching creditor.

History: En. Sec. 1, Ch. 111, L. 1921; re-en. Sec. 9291, R.C.M. 1921; re-en. Sec. 9291, R.C.M. 935; amd. Sec. 11-162, Ch. 264, L. 1963; R.C.M. 1947, 93-4338(part).

Part 5

Proceedings in Aid of Attachment

27-18-501. Examination under oath of defendant or person ontrolling property or debts — order that property be delivered. ny person owing debts to the defendant or having in his possession or nder his control any credits or other personal property belonging to the efendant may be required to attend before the court or judge or referee ppointed by the court or judge and be examined on oath respecting the ame. The defendant may also be required to attend for the purpose of iving information respecting his property and may be examined on oath. he court or judge may, after such examination, order personal property apable of manual delivery in the hands or under the control of such person r of the defendant to be delivered to the sheriff on such terms as may be ust, having reference to any liens thereon or claims against the same, and memorandum to be given of all other personal property, containing the mount and description thereof.

History: En. Sec. 99, p. 62, Bannack Stat.; re-en. Sec. 128, p. 158, L. 1867; re-en. Sec. 146, p. , Cod. Stat. 1871; re-en. Sec. 188, p. 86, L. 1877; re-en. Sec. 188, 1st Div. Rev. Stat. 1879; re-en. ec. 190, 1st Div. Comp. Stat. 1887; re-en. Sec. 901, C. Civ. Proc. 1895; re-en. Sec. 6668, Rev. C. 907; re-en. Sec. 9268, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 545; re-en. Sec. 9268, R.C.M. 1935; .C.M. 1947, 93-4315.

27-18-502. Person holding property to give sheriff certificate f defendant's interest. Upon the application of a sheriff holding a writ f attachment, the president or other head of an association or corporation r the secretary, cashier, or managing agent thereof or a debtor of the defen- ant or a person holding property, including a bond, promissory note, or ther instrument for the payment of money, belonging to the defendant must urnish to the sheriff a certificate, under his hand, specifying his right to a umber of shares of the defendant in the stock of the association or corpora- on, with all dividends declared or encumbrances thereon, or the amount, ature, and description of the property held for the benefit of the defendant r of the defendant's interest in property so held or of the debt or demand wing to the defendant, as the case requires.

History: En. Sec. 896, C. Civ. Proc. 1895; re-en. Sec. 6663, Rev. C. 1907; re-en. Sec. 9263, R.C.M. 921; re-en. Sec. 9263, R.C.M. 1935; R.C.M. 1947, 93-4310.

27-18-503. Order to person holding property to submit to xamination under oath. If a person to whom application is made, as pre- cribed in 27-18-502, refuses to give such certificate or if it is made to appear, by affidavit, to the satisfaction of the court or a judge thereof, tha there is reason to suspect that a certificate given by him is untrue or tha it failed fully to set forth the facts required to be shown thereby, the cour or judge may make an order directing him to attend, at a specified time an at a place within the county to which the writ is issued, and submit to a examination under oath concerning the same. The order may, in the discretion of the court or judge, direct an appearance before a referee name therein.

History: En. Sec. 897, C. Civ. Proc. 1895; re-en. Sec. 6664, Rev. C. 1907; re-en. Sec. 9264, R.C.M 1921; re-en. Sec. 9264, R.C.M. 1935; R.C.M. 1947, 93-4311.

Part 6

Procedure Following Attachment — Return of Writ

27-18-601. Sheriff to retain nonperishable attached propert and proceeds of sales. The proceeds and other property attached by th sheriff must be retained by him to answer any judgment that may b recovered in the action unless sooner subjected to execution upon anothe judgment recovered previous to the issuing of the attachment.

History: En. Sec. 101, p. 63, Bannack Stat.; re-en. Sec. 130, p. 158, L. 1867; re-en. Sec. 148, p 57, Cod. Stat. 1871; re-en. Sec. 190, p. 86, L. 1877; re-en. Sec. 190, 1st Div. Rev. Stat. 1879; re-en Sec. 192, 1st Div. Comp. Stat. 1887; re-en. Sec. 903, C. Civ. Proc. 1895; re-en. Sec. 6670, Rev. C 1907; re-en. Sec. 9270, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 547; re-en. Sec. 9270, R.C.M. 1935 R.C.M. 1947, 93-4317(part).

27-18-602. Claim of attached property by third person — plaintiff to indemnify sheriff. If personal property attached be claimed by third person, he shall give notice thereof to the sheriff and deliver to him a affidavit, stating his claim, ownership, and a description of the property; an unless the plaintiff, within 10 days after receiving notice thereof, give th sheriff a good and sufficient bond to indemnify him against loss or damag by reason of such retaining said property, the sheriff shall deliver the sam to such person.

History: En. Sec. 149, p. 57, Cod. Stat. 1871; re-en. Sec. 191, p. 87, L. 1877; re-en. Sec. 191, 1s Div. Rev. Stat. 1879; re-en. Sec. 193, 1st Div. Comp. Stat. 1887; en. Sec. 906, C. Civ. Proc. 1895 re-en. Sec. 6673, Rev. C. 1907; re-en. Sec. 9273, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 549; re-en. Sec 9273, R.C.M. 1935; R.C.M. 1947, 93-4320.

27-18-603. Sheriff's inventory of attached property — cooperation of persons controlling credits or debts. (1) The sheriff must make a full inventory of the property attached and return the same with the writ. When the sheriff has levied several writs of attachment on the same property, only one inventory must be made.

(2) To enable him to make such return as to debts and credits attached, he must request, at the time of service, the person owing the debt or having the credit to give him the memorandum, stating the amount and description of each; and if such memorandum be refused, the sheriff may apply upon 1 day's notice to the court or judge for an order to compel such memorandum to be given. If the order be granted, it shall also direct the payment of costs of the motion by the person refusing.

History: En. Sec. 100, p. 63, Bannack Stat.; amd. Sec. 129, p. 158, L. 1867; re-en. Sec. 147, p. 57, Cod. Stat. 1871; re-en. Sec. 189, p. 86, L. 1877; re-en. Sec. 189, 1st Div. Rev. Stat. 1879; re-en.

ec. 191, 1st Div. Comp. Stat. 1887; re-en. Sec. 902, C. Civ. Proc. 1895; re-en. Sec. 6669, Rev. C. 907; re-en. Sec. 9269, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 546; re-en. Sec. 9269, R.C.M. 1935; .C.M. 1947, 93-4316.

27-18-604. Sheriff's return of writ. The sheriff must return the writ f attachment with the summons if issued at the same time, otherwise, ithin 20 days after its receipt, with a certificate of his proceedings endorsed iereon or attached thereto.

History: En. Sec. 114, p. 66, Bannack Stat.; re-en. Sec. 141, p. 160, L. 1867; re-en. Sec. 159, p. , Cod. Stat. 1871; re-en. Sec. 201, p. 89, L. 1877; re-en. Sec. 201, 1st Div. Rev. Stat. 1879; re-en. c. 203, 1st Div. Comp. Stat. 1887; amd. Sec. 919, C. Civ. Proc. 1895; re-en. Sec. 6686, Rev. C. 1907; -en. Sec. 9287, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 559; re-en. Sec. 9287, R.C.M. 1935; R.C.M. 47, 93-4334(part).

Part 7

Methods of Defending Against Attachment

27-18-701. Right to hearing following seizure without notice — otice of right. When a writ has been issued upon real property or upon ie showing specified in 27-18-205(3)(b)(ii), the defendant may challenge the izure of the property at a hearing before the court to be held within 3 days fter the seizure. Notice of the right to a postseizure hearing shall be served ersonally on the defendant, or if the defendant cannot be found for personal rvice, notice shall be posted on the property and in three public places in ie county where the property is located.

History: En. 93-4304.2 by Sec. 5, Ch. 299, L. 1977; R.C.M. 1947, 93-4304.2(1).

27-18-702. When writ quashed. At such hearing the defendant may iallenge the merit of the underlying action, the need for the prejudgment izure of property, or both. The writ shall be quashed if the court makes preliminary finding that:

(1) the plaintiff cannot establish the prima facie validity of his claim; or

(2) the plaintiff cannot establish by a preponderance of the evidence the eed for the continued attachment of the defendant's property.

History: En. 93-4304.2 by Sec. 5, Ch. 299, L. 1977; R.C.M. 1947, 93-4304.2(2).

27-18-703 through 27-18-710 reserved.

27-18-711. Motion to discharge writ improperly issued. The efendant may also, at any time either before or after the release of the ttached property or before any attachment shall have been actually levied, pply on motion, upon reasonable notice to the plaintiff, to the court in hich the action is brought or to a judge thereof that the writ of attachment e discharged on the ground that the same was improperly or irregularly sued.

History: En. Sec. 138, p. 160, L. 1867; re-en. Sec. 156, p. 59, Cod. Stat. 1871; amd. Sec. 1, p. , L. 1874; amd. Sec. 198, p. 89, L. 1877; re-en. Sec. 198, 1st Div. Rev. Stat. 1879; re-en. Sec. 200, t Div. Comp. Stat. 1887; en. Sec. 914, C. Civ. Proc. 1895; re-en. Sec. 6681, Rev. C. 1907; re-en. c. 9282, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 556; re-en. Sec. 9282, R.C.M. 1935; R.C.M. 1947, -4329.

27-18-712. Use of affidavits to support or oppose motion. If th motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other evidence i addition to those on which the attachment was made.

History: En. Sec. 139, p. 160, L. 1867; re-en. Sec. 157, p. 59, Cod. Stat. 1871; re-en. Sec. 19 p. 89, L. 1877; re-en. Sec. 199, 1st Div. Rev. Stat. 1879; re-en. Sec. 201, 1st Div. Comp. Stat. 188 re-en. Sec. 915, C. Civ. Proc. 1895; re-en. Sec. 6682, Rev. C. 1907; re-en. Sec. 9283, R.C.M. 192 Cal. C. Civ. Proc. Sec. 557; re-en. Sec. 9283, R.C.M. 1935; R.C.M. 1947, 93-4330.

27-18-713. Decision of court. If upon such application it satisfactorily appears that the writ of attachment was improperly or irregularl issued, it must be discharged. But the court or judge may allow the plaintif to amend his affidavit or undertaking.

History: En. Sec. 140, p. 160, L. 1867; re-en. Sec. 158, p. 59, Cod. Stat. 1871; re-en. Sec. 20 p. 89, L. 1877; re-en. Sec. 200, 1st Div. Rev. Stat. 1879; re-en. Sec. 202, 1st Div. Comp. Stat. 188 amd. Sec. 916, C. Civ. Proc. 1895; re-en. Sec. 6683, Rev. C. 1907; re-en. Sec. 9284, R.C.M. 1921 Cal. C. Civ. Proc. Sec. 558; re-en. Sec. 9284, R.C.M. 1935; R.C.M. 1947, 93-4331.

27-18-714 reserved.

27-18-715. Exception to plaintiff's sureties. At any time within 3 days after the service of summons, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived al objections to them.

History: En. Sec. 93, p. 61, Bannack Stat.; amd. Sec. 122, p. 156, L. 1867; amd. Sec. 12, p. 65 L. 1869; amd. Sec. 7, p. 75, L. 1870; amd. Sec. 138, p. 54, Cod. Stat. 1871; amd. Sec. 20, p. 56, L 1874; amd. Sec. 180, p. 82, L. 1877; re-en. Sec. 180, 1st Div. Rev. Stat. 1879; amd. Sec. 6, p. 9, L 1881; re-en. Sec. 182, 1st Div. Comp. Stat. 1887; en. Sec. 892, C. Civ. Proc. 1895; re-en. Sec. 6659 Rev. C. 1907; re-en. Sec. 9259, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 539; re-en. Sec. 9259, R.C.M 1935; amd. Sec. 1, Ch. 15, L. 1951; amd. Sec. 1, Ch. 303, L. 1967; amd. Sec. 3, Ch. 299, L. 1977 R.C.M. 1947, 93-4304(2).

27-18-716. Justification of sureties. When excepted to, th plaintiff's sureties, upon notice to the defendant of not less than 2 days o more than 10 days, must justify before a judge of the district court, and upo failure to justify or if others in their place fail to justify at the time an place appointed, the judge shall issue an order vacating the writ of attachment.

History: En. Sec. 93, p. 61, Bannack Stat.; amd. Sec. 122, p. 156, L. 1867; amd. Sec. 12, p. 65 L. 1869; amd. Sec. 7, p. 75, L. 1870; amd. Sec. 138, p. 54, Cod. Stat. 1871; amd. Sec. 20, p. 56, L 1874; amd. Sec. 180, p. 82, L. 1877; re-en. Sec. 180, 1st Div. Rev. Stat. 1879; amd. Sec. 6, p. 9, L 1881; re-en. Sec. 182, 1st Div. Comp. Stat. 1887; en. Sec. 892, C. Civ. Proc. 1895; re-en. Sec. 6659 Rev. C. 1907; re-en. Sec. 9259, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 539; re-en. Sec. 9259, R.C.M 1935; amd. Sec. 1, Ch. 15, L. 1951; amd. Sec. 1, Ch. 303, L. 1967; amd. Sec. 3, Ch. 299, L. 1977 R.C.M. 1947, 93-4304(3).

27-18-717 through 27-18-720 reserved.

27-18-721. Proceedings to release attachment. Whenever the defendant has appeared in the action, he may, upon reasonable notice to the plaintiff, apply to the court in which the action is pending or to the judge thereof for an order to discharge the attachment, wholly or in part; and upon the execution of the undertaking mentioned in 27-18-722, an order may be made releasing from the operation of the attachment any or all of the property attached; and all of the property so released and all of the proceeds of e sale thereof must be delivered to the defendant upon the justification of e sureties on the undertaking, if required by the plaintiff.

History: En. Sec. 108, p. 65, Bannack Stat.; re-en. Sec. 136, p. 159, L. 1867; amd. Sec. 154, p. , Cod. Stat. 1871; re-en. Sec. 196, p. 88, L. 1877; re-en. Sec. 196, 1st Div. Rev. Stat. 1879; re-en. c. 198, 1st Div. Comp. Stat. 1887; amd. Sec. 912, C. Civ. Proc. 1895; re-en. Sec. 6679, Rev. C. 1907; -en. Sec. 9280, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 554; re-en. Sec. 9280, R.C.M. 1935; R.C.M. 47, 93-4327.

27-18-722. Defendant's undertaking — justification of sureties. efore making such order, the court or judge must require an undertaking n behalf of the defendant, by at least two sureties, residents and freeholders householders in the state, to the effect that in case the plaintiff recover dgment in the action, the defendant will, on demand, redeliver the attached operty so released to the proper officer to be applied to the payment of e judgment or, in default thereof, that the defendant and sureties will, on emand, pay to the plaintiff the full value of the property released. The urt or judge making the order may fix the sum for which the undertaking all be executed, and if necessary in fixing such sum to know the value of e property released, the same may be appraised by one or more disinterested persons to be appointed for that purpose. The sureties may be required justify before the court or judge, and the property attached cannot be leased without their justification, if the same be required.

History: En. Sec. 109, p. 65, Bannack Stat.; en. Sec. 137, p. 159, L. 1867; amd. Sec. 2, p. 67, L. 69; re-en. Sec. 155, p. 58, Cod. Stat. 1871; amd. Sec. 1, p. 48, L. 1874; amd. Sec. 197, p. 88, L. 77; re-en. Sec. 197, 1st Div. Rev. Stat. 1879; re-en. Sec. 199, 1st Div. Comp. Stat. 1887; amd. Sec. 3, C. Civ. Proc. 1895; re-en. Sec. 6680, Rev. C. 1907; re-en. Sec. 9281, R.C.M. 1921; Cal. C. Civ. oc. Sec. 555; re-en. Sec. 9281, R.C.M. 1935; R.C.M. 1947, 93-4328.

27-18-723 and 27-18-724 reserved.

27-18-725. Motion to vacate or modify writ or increase secur- y. The defendant or a person who has acquired a lien upon or interest in s property after it was attached may, at any time before the actual application of the attached property or the proceeds thereof to the payment of a dgment recovered in the action, apply to vacate or modify the writ of tachment or to increase the security given by the plaintiff or for one or ore of those forms of release together or in the alternative.

History: En. Sec. 917, C. Civ. Proc. 1895; re-en. Sec. 6684, Rev. C. 1907; re-en. Sec. 9285, R.C.M. 21; re-en. Sec. 9285, R.C.M. 1935; R.C.M. 1947, 93-4332.

27-18-726. Proceedings on motion. An application specified in -18-725 may be founded only upon:

(1) the papers upon which the writ was granted, in which case it must be ade to the court or judge, with or without notice as the court or judge ems proper; or

(2) proof by affidavits on the part of the defendant or a person who has quired a lien upon or interest in his property after it was attached, in ich case it must be made to the court or judge upon notice and may be posed by new proof, by affidavit or other evidence on the part of the aintiff, tending to sustain any grounds of attachment.

History: En. Sec. 918, C. Civ. Proc. 1895; re-en. Sec. 6685, Rev. C. 1907; re-en. Sec. 9286, R.C.M. 21; re-en. Sec. 9286, R.C.M. 1935; R.C.M. 1947, 93-4333.

27-18-727 through 27-18-730 reserved.

27-18-731. Filing of order discharging or releasing attachmen of real property. Whenever an order has been made discharging or releasing an attachment upon real property, a certified copy of such order mus be filed in the office of the county clerk in which the notice of the attachment has been filed and be indexed in like manner.

History: En. Sec. 114, p. 66, Bannack Stat.; re-en. Sec. 141, p. 160, L. 1867; re-en. Sec. 159, 59, Cod. Stat. 1871; re-en. Sec. 201, p. 89, L. 1877; re-en. Sec. 201, 1st Div. Rev. Stat. 1879; re-e Sec. 203, 1st Div. Comp. Stat. 1887; amd. Sec. 919, C. Civ. Proc. 1895; re-en. Sec. 6686, Rev. C. 190 re-en. Sec. 9287, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 559; re-en. Sec. 9287, R.C.M. 1935; R.C.M 1947, 93-4334(part).

27-18-732. Release of attachment of real property by clerk when action not prosecuted — filing. If a writ of attachment has bee levied on real property, as provided in part 4, and no proceedings have bee taken in the action in which the attachment was issued for a period of years, the clerk of court shall, upon application of the defendant or th record owner of such real property, issue a release of the attachment and copy of such release shall be filed with the county clerk where the writ o attachment and notice thereof is filed and the county clerk shall file an index such release as any other releases of attachment.

History: En. Sec. 1, Ch. 97, L. 1965; R.C.M. 1947, 93-4331.1.

Part 8

Sale of Attached Property

27-18-801. Sheriff to sell perishable property. If any of the property attached be perishable, the sheriff must sell the same in the manner i which such property is sold on execution.

History: En. Sec. 101, p. 63, Bannack Stat.; re-en. Sec. 130, p. 158, L. 1867; re-en. Sec. 148, p 57, Cod. Stat. 1871; re-en. Sec. 190, p. 86, L. 1877; re-en. Sec. 190, 1st Div. Rev. Stat. 1879; re-en Sec. 192, 1st Div. Comp. Stat. 1887; re-en. Sec. 903, C. Civ. Proc. 1895; re-en. Sec. 6670, Rev. C 1907; re-en. Sec. 9270, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 547; re-en. Sec. 9270, R.C.M. 1935 R.C.M. 1947, 93-4317(part).

27-18-802. Authority of court to order sale of property. Whenever property has been taken by an officer under a writ of attachment an it is made to appear satisfactorily to the court or a judge thereof that th interest of the parties to the action will be subserved by a sale thereof, th court or judge may order such property to be sold in the same manner a property is sold under an execution and the proceeds to be deposited in th court to abide the judgment in the action.

History: En. Sec. 437, p. 132, Bannack Stat.; re-en. Sec. 594, p. 157, Cod. Stat. 1871; re-en. Sec 524, p. 177, L. 1877; re-en. Sec. 524, 1st Div. Rev. Stat. 1879; re-en. Sec. 541, 1st Div. Comp. Stat 1887; amd. Sec. 904, C. Civ. Proc. 1895; re-en. Sec. 6671, Rev. C. 1907; re-en. Sec. 9271, R.C.M 1921; Cal. C. Civ. Proc. Sec. 548; re-en. Sec. 9271, R.C.M. 1935; R.C.M. 1947, 93-4318.

27-18-803. Notice of application for order to sell. Application fo the order shall be upon such notice to the adverse party or his attorney a the court or judge, considering the nature and condition of the property, may direct. If it shall appear to the court or judge that the delay necessary to give notice would cause a material depreciation in the value of property, the order may be made without notice.

History: En. Sec. 905, C. Civ. Proc. 1895; re-en. Sec. 6672, Rev. C. 1907; re-en. Sec. 9272, R.C.M. 1921; re-en. Sec. 9272, R.C.M. 1935; R.C.M. 1947, 93-4319.

27-18-804. Sale of property subject to a security interest — disposition of proceeds, security agreement. (1) When the property taken under 27-18-413 is sold under process, the officer levying the writ must apply the proceeds of the sale as follows:

(a) to the repayment of the sum paid to the secured party, with interest from the date of such payment; and

(b) the balance, if any, in like manner as the proceeds of sales under execution are applied in other cases.

(2) In the event the property is sold under attachment, such attaching creditor shall be required to deliver to the debtor the security agreement and any note or other evidence of indebtedness secured thereby obtained from the secured party when the property is sold for the amount of the indebtedness under the security agreement or an amount in excess thereof.

History: En. Sec. 1, Ch. 111, L. 1921; re-en. Sec. 9291, R.C.M. 1921; re-en. Sec. 9291, R.C.M. 1935; amd. Sec. 11-162, Ch. 264, L. 1963; R.C.M. 1947, 93-4338(part).

Part 9

Judgment and Subsequent Procedure

27-18-901. Judgment when debt not yet due. (1) On the trial of any cause brought under the provisions of 27-18-203, judgment may be rendered on any such debt not due upon satisfactory proof to the court of the facts alleged in the affidavit for attachment, as provided in that section. Any such judgment shall be with a rebatement of the interest from the time said judgment is rendered until the time at which said debt shall have become due.

(2) The defendant may, by plea, put in issue the matter alleged in the affidavit required in 27-18-203, and if the plaintiff fails to substantiate some one of the causes required to be alleged in said affidavit, the suit for debt or debts not due shall abate.

History: En. Sec. 1, p. 141, L. 1899; re-en. Sec. 6658, Rev. C. 1907; amd. Sec. 1, Ch. 14, L. 1911; e-en. Sec. 9258, R.C.M. 1921; re-en. Sec. 9258, R.C.M. 1935; R.C.M. 1947, 93-4303(part).

27-18-902. Procedure when defendant recovers judgment. If the defendant recover judgment against the plaintiff, any undertaking received in the action, all of the proceeds of sales and money collected by the sheriff, and all the property attached remaining in the sheriff's hands must be delivered to the defendant or his agent; the order of attachment shall be discharged and the property released therefrom.

History: En. Sec. 106, p. 64, Bannack Stat.; re-en. Sec. 135, p. 159, L. 1867; re-en. Sec. 153, p. 8, Cod. Stat. 1871; re-en. Sec. 195, p. 88, L. 1877; re-en. Sec. 195, 1st Div. Rev. Stat. 1879; re-en. Sec. 197, 1st Div. Comp. Stat. 1887; re-en. Sec. 911, C. Civ. Proc. 1895; re-en. Sec. 6678, Rev. C. 1907; re-en. Sec. 9279, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 553; re-en. Sec. 9279, R.C.M. 1935; R.C.M. 1947, 93-4326.

27-18-903. Judgment for plaintiff — disposition of attached property and proceeds of sales. If judgment be recovered by plaintiff the sheriff must satisfy the same out of the property attached by him which has not been delivered to the defendant or claimant, as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose:

(1) by paying to the plaintiff the proceeds of all sales of perishable property or property ordered by the court or judge to be sold by him, or of any debts or credits collected by him, or so much thereof as shall be necessary to satisfy the judgment;

(2) if any balance remain due and an execution shall have been issued on the judgment, by selling under the execution so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his hands. Notices of the sales must be given and the sales conducted as in other cases of sales on execution.

History: En. Sec. 103, p. 64, Bannack Stat.; re-en. Sec. 132, p. 159, L. 1867; re-en. Sec. 150, p. 58, Cod. Stat. 1871; re-en. Sec. 192, p. 87, L. 1877; re-en. Sec. 192, 1st Div. Rev. Stat. 1879; re-en. Sec. 194, 1st Div. Comp. Stat. 1887; re-en. Sec. 908, C. Civ. Proc. 1895; re-en. Sec. 6675, Rev. C. 1907; re-en. Sec. 9276, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 550; re-en. Sec. 9276, R.C.M. 1935; R.C.M. 1947, 93-4323.

27-18-904. Delivery of excess property and proceeds to defendant. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, must deliver over to the defendant the attached property remaining in his hands and any proceeds of property attached unapplied on the judgment.

History: En. Sec. 104, p. 64, Bannack Stat.; re-en. Sec. 133, p. 159, L. 1867; re-en. Sec. 151, p. 58, Cod. Stat. 1871; re-en. Sec. 193, p. 87, L. 1877; re-en. Sec. 193, 1st Div. Rev. Stat. 1879; re-en. Sec. 195, 1st Div. Comp. Stat. 1887; re-en. Sec. 909, C. Civ. Proc. 1895; re-en. Sec. 6676, Rev. C. 1907; re-en. Sec. 9277, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 551; re-en. Sec. 9277, R.C.M. 1935; R.C.M. 1947, 93-4324(part).

27-18-905. Execution of balance due on judgment. If, after selling all property attached by him remaining in his hands and applying the proceeds, together with the proceeds of any debt or credit collected by him, deducting his fee, to the payment of the judgment, any balance shall remain due, the sheriff must proceed to collect such balance as upon an execution in other cases.

History: En. Sec. 104, p. 64, Bannack Stat.; re-en. Sec. 133, p. 159, L. 1867; re-en. Sec. 151, p. 58, Cod. Stat. 1871; re-en. Sec. 193, p. 87, L. 1877; re-en. Sec. 193, 1st Div. Rev. Stat. 1879; re-en. Sec. 195, 1st Div. Comp. Stat. 1887; re-en. Sec. 909, C. Civ. Proc. 1895; re-en. Sec. 6676, Rev. C. 1907; re-en. Sec. 9277, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 551; re-en. Sec. 9277, R.C.M. 1935; R.C.M. 1947, 93-4324(part).

27-18-906. Procedure when execution returned unsatisfied. If the execution is returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to 27-18-301 or 27-18-722 or he may proceed, as in other cases, upon the return of an execution.

History: En. Sec. 105, p. 64, Bannack Stat.; re-en. Sec. 134, p. 159, L. 1867; re-en. Sec. 152, p. 58, Cod. Stat. 1871; re-en. Sec. 194, p. 88, L. 1877; re-en. Sec. 194, 1st Div. Rev. Stat. 1879; re-en. Sec. 196, 1st Div. Comp. Stat. 1887; re-en. Sec. 910, C. Civ. Proc. 1895; re-en. Sec. 6677, Rev. C. 1907; re-en. Sec. 9278, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 552; re-en. Sec. 9278, R.C.M. 1935; R.C.M. 1947, 93-4325.

Parts 10 through 14 reserved

Part 15

Attachment in Justice's Court

27-18-1501. Justice's authority to issue writ. A writ to attach the property of the defendant may be issued by the justice at the time of or after issuing summons and before answer, on receiving an affidavit by or on behalf of the plaintiff, showing the same facts as are required to be shown by the affidavit specified in 27-18-202.

History: En. Sec. 568, p. 155, Bannack Stat.; re-en. Sec. 674, p. 172, Cod. Stat. 1871; re-en. Sec. 734, 1st Div. Rev. Stat. 1879; re-en. Sec. 754, 1st Div. Comp. Stat. 1887; amd. Sec. 1560, C. Civ. Proc. 1895; re-en. Sec. 7026, Rev. C. 1907; re-en. Sec. 9659, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 866; re-en. Sec. 9659, R.C.M. 1935; amd. Sec. 6, Ch. 299, L. 1977; R.C.M. 1947, 93-6908.

27-18-1502. Plaintiff's undertaking. Before issuing the writ, the justice must require a written undertaking in due form on the part of the plaintiff, with two or more sureties, in a sum of not less than $50 or more than $300, to the effect that if defendant recover judgment, the plaintiff will pay all costs that may be awarded to defendant and all damages which he may sustain by reason of the attachment, not exceeding the sum specified in the undertaking.

History: En. Sec. 569, p. 155, Bannack Stat.; re-en. Sec. 675, p. 172, Cod. Stat. 1871; re-en. Sec. 735, 1st Div. Rev. Stat. 1879; re-en. Sec. 755, 1st Div. Comp. Stat. 1887; amd. Sec. 1561, C. Civ. Proc. 1895; re-en. Sec. 7027, Rev. C. 1907; amd. Sec. 1, Ch. 86, L. 1911; re-en. Sec. 9660, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 867; re-en. Sec. 9660, R.C.M. 1935; R.C.M. 1947, 93-6909(part).

27-18-1503. Exception to sureties — justification. Within 2 days after or at any time before the service of the writ of attachment upon defendant, he may except to the sufficiency of the sureties, and if he fails to do so, he is deemed to have waived all objections to them. When excepted to, the sureties must, within 3 days after notice by the defendant of not less than 1 day, justify before the justice, and upon failure to justify or if others in their place fail to justify at the time and place appointed, the justice shall make an order vacating the writ of attachment.

History: En. Sec. 569, p. 155, Bannack Stat.; re-en. Sec. 675, p. 172, Cod. Stat. 1871; re-en. Sec. 735, 1st Div. Rev. Stat. 1879; re-en. Sec. 755, 1st Div. Comp. Stat. 1887; amd. Sec. 1561, C. Civ. Proc. 1895; re-en. Sec. 7027, Rev. C. 1907; amd. Sec. 1, Ch. 86, L. 1911; re-en. Sec. 9660, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 867; re-en. Sec. 9660, R.C.M. 1935; R.C.M. 1947, 93-6909(part).

27-18-1504. Form and content of writ — defendant's undertaking to prevent levy. (1) The writ may be directed to the sheriff or any constable of the county or the sheriff of any other county and must require him to:

(a) attach and safely keep all the property of the defendant in his county, not exempt from attachment, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the complaint; or

(b) if the defendant gives him security by the undertaking of two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, take such undertaking.

(2) The undertaking must be to the plaintiff and must be approved in writing on the back thereof by the plaintiff or his attorney or, upon their refusal, by the justice issuing the writ.

History: En. Sec. 570, p. 155, Bannack Stat.; re-en. Sec. 676, p. 172, Cod. Stat. 1871; re-en. Sec. 736, 1st Div. Rev. Stat. 1879; re-en. Sec. 756, 1st Div. Comp. Stat. 1887; re-en. Sec. 1562, C. Civ. Proc. 1895; amd. Sec. 2, p. 141, L. 1899; re-en. Sec. 7028, Rev. C. 1907; re-en. Sec. 9661, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 868; re-en. Sec. 9661, R.C.M. 1935; R.C.M. 1947, 93-6910; amd. Sec. 44, Ch. 12, L. 1979.

27-18-1505. Security for sheriff's costs. If the sheriff will incur substantial costs in transporting, keeping, or storing the property seized, the party requesting service of a writ of attachment shall provide a bond or other security to pay for all costs which may be incurred as a result of the service of such writ.

History: En. Sec. 4393, Pol. C. 1895; re-en. Sec. 3022, Rev. C. 1907; re-en. Sec. 4786, R.C.M. 1921; Cal. Pol. C. Sec. 4185; re-en. Sec. 4786, R.C.M. 1935; amd. Sec. 1, Ch. 426, L. 1977; R.C.M. 1947, 16-2714(part).

27-18-1506. Applicability of procedure in district court. Part 1; 27-18-207, 27-18-303 through 27-18-308; parts 4, 5, and 6; 27-18-711 through 27-18-713, 27-18-721 through 27-18-732; and parts 8 and 9, except 27-18-901, are applicable to attachments issued in justices' courts, the word "constable" being substituted for the word "sheriff" whenever the writ is directed to a constable, and the word "justice" substituted for "judge".

History: En. Sec. 571, p. 155, Bannack Stat.; re-en. Sec. 677, p. 172, Cod. Stat. 1871; re-en. Sec. 737, 1st Div. Rev. Stat. 1879; re-en. Sec. 757, 1st Div. Comp. Stat. 1887; re-en. Sec. 1563, C. Civ. Proc. 1895; re-en. Sec. 7029, Rev. C. 1907; re-en. Sec. 9662, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 869; re-en. Sec. 9662, R.C.M. 1935; R.C.M. 1947, 93-6911; amd. Sec. 45, Ch. 12, L. 1979.

CHAPTER 19

INJUNCTIONS

Part 1 — General Provisions

Section

27-19-101. Definition of injunction — by whom granted.
27-19-102. When final injunction may be granted to prevent breach of obligation.
27-19-103. When injunction may not be granted.
27-19-104. Contents of complaint — action for injunction by an association.
27-19-105. Form and scope of injunction or restraining order.

Part 2 — Availability of Preliminary Injunction

27-19-201. When preliminary injunction may be granted.
27-19-202. Preliminary injunction pending action for restraint of trade.
27-19-203. Preliminary injunction pending action by public service commission.
27-19-204. Issuance without bond.

Part 3 — Procedure for Obtaining Preliminary Injunction

27-19-301. Notice of application — hearing.
27-19-302. Repealed. Sec. 18, Ch. 399, L. 1979.
27-19-303. Time of granting injunction, evidence required.
27-19-304. Repealed. Sec. 18, Ch. 399, L. 1979.
27-19-305. Renumbered 27-19-314 by Code Commissioner, 1979.
27-19-306. Security for damages.

27-19-307. New undertaking for security following hearing.
Sections 27-19-308 through 27-19-310 reserved.
27-19-311. Repealed. Sec. 18, Ch. 399, L. 1979.
27-19-312. Renumbered 27-19-303(3) by Code Commissioner, 1979.
27-19-313. Renumbered 27-19-307 by Code Commissioner, 1979.
27-19-314. Temporary restraining order.
27-19-315. When restraining order may be granted without notice.
27-19-316. Contents and filing of restraining order granted without notice.
27-19-317. Extension of expiration date.
27-19-318. Application for injunction to be heard without delay.
27-19-319. Motion to dissolve or modify restraining order.

Part 4 — Dissolution or Modification of Preliminary Injunction

27-19-401. Application to dissolve or modify injunction.
27-19-402. Repealed. Sec. 18, Ch. 399, L. 1979.
27-19-403. New undertaking for security following hearing.
27-19-404. When injunction dissolved or modified.
27-19-405. Enjoined party's undertaking for security upon dissolution.
27-19-406. Costs upon dissolution.

Part 1

General Provisions

27-19-101. Definition of injunction — by whom granted. An injunction is an order requiring a person to refrain from a particular act. The order may be granted by the court in which the action is brought or by a judge thereof and, when made by a judge, be enforced as the order of the court.

History: En. Sec. 82, p. 58, Bannack Stat.; amd. Sec. 111, p. 154, L. 1867; re-en. Sec. 128, p. 52, Cod. Stat. 1871; re-en. Sec. 170, p. 79, L. 1877; re-en. Sec. 170, 1st Div. Rev. Stat. 1879; re-en. Sec. 172, 1st Div. Comp. Stat. 1887; amd. Sec. 870, C. Civ. Proc. 1895; re-en. Sec. 6642, Rev. C. 1907; re-en. Sec. 9240, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 525; re-en. Sec. 9240, R.C.M. 1935; R.C.M. 1947, 93-4201.

27-19-102. When final injunction may be granted to prevent breach of obligation. Except where otherwise provided by the provisions of the code governing specific and preventive relief (chapter 1, part 4, of this title and Title 28, chapter 2, parts 16 and 17), a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant where:

(1) pecuniary compensation would not afford adequate relief;

(2) it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;

(3) the restraint is necessary to prevent a multiplicity of judicial proceedings; or

(4) the obligation arises from a trust.

History: En. Sec. 4462, Civ. C. 1895; re-en. Sec. 6120, Rev. C. 1907; re-en. Sec. 9241, R.C.M. 1921; Cal. Civ. C. Sec. 3422; Field Civ. C. Sec. 1911; re-en. Sec. 9241, R.C.M. 1935; R.C.M. 1947, 93-4202.

27-19-103. When injunction may not be granted. An injunction cannot be granted:

(1) to stay a judicial proceeding pending at the commencement of an action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings;

(2) to stay proceedings in a court of the United States;

(3) to stay proceedings in another state upon a judgment of a court o that state;

(4) to prevent the execution of a public statute by officers of the law for the public benefit;

(5) to prevent the breach of a contract the performance of which would not be specifically enforced;

(6) to prevent the exercise of a public or private office, in a lawful manner, by the person in possession;

(7) to prevent a legislative act by a municipal corporation;

(8) in labor disputes under any other or different circumstances or conditions than if the controversy were of another or different character or between parties neither or none of whom were laborers or interested in labor questions.

History: En. Sec. 4463, Civ. C. 1895; re-en. Sec. 6121, Rev. C. 1907; amd. Sec. 1, Ch. 28, L. 1913; re-en. Sec. 9242, R.C.M. 1921; Cal. Civ. C. Sec. 3423; Based on Field Civ. C. Sec. 1912; re-en. Sec. 9242, R.C.M. 1935; R.C.M. 1947, 93-4203.

27-19-104. Contents of complaint — action for injunction by an association. Whenever an action for injunctive relief is initiated by a citizens' group or other public interest association and it appears by the complaint that there is an injury to a property or civil right of individual members of the association, which injury is distinguishable from an injury to the public generally, the names and addresses of injured members and a statement of the injury shall be provided in the complaint. An injunction may not be granted unless such information is provided in the complaint.

History: En. 93-4204.1 by Sec. 1, Ch. 170, L. 1977; R.C.M. 1947, 93-4204.1.

27-19-105. Form and scope of injunction or restraining order. An order granting an injunction or a restraining order shall:

(1) set forth the reasons for its issuance;

(2) be specific in its terms;

(3) describe in reasonable detail, and not by reference to the complaint or any other document, the act or acts sought to be restrained; and

(4) be binding only upon the parties to the action; their officers, agents, employees, and attorneys; and those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

History: En. Sec. 6, Ch. 399, L. 1979.

Part 2

Availability of Preliminary Injunction

27-19-201. When preliminary injunction may be granted. An injunction order may be granted in the following cases:

(1) when it shall appear that the applicant is entitled to the relief demanded and such relief or any part thereof consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

(2) when it shall appear that the commission or continuance of some act during the litigation would produce a great or irreparable injury to the applicant;

(3) when it shall appear during the litigation that the adverse party is doing or threatens or is about to do or is procuring or suffering to be done some act in violation of the applicant's rights, respecting the subject of the action, and tending to render the judgment ineffectual;

(4) when it appears that the adverse party, during the pendency of the action, threatens or is about to remove or to dispose of his property with intent to defraud the applicant, an injunction order may be granted to restrain the removal or disposition.

History: En. Sec. 83, p. 58, Bannack Stat.; re-en. Sec. 112, p. 154, L. 1867; re-en. Sec. 129, p. 52, Cod. Stat. 1871; re-en. Sec. 171, p. 79, L. 1877; re-en. Sec. 171, 1st Div. Rev. Stat. 1879; re-en. Sec. 173, 1st Div. Comp. Stat. 1887; amd. Sec. 871, C. Civ. Proc. 1895; re-en. Sec. 6643, Rev. C. 1907; re-en. Sec. 9243, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 526; re-en. Sec. 9243, R.C.M. 1935; R.C.M. 1947, 93-4204; amd. Sec. 1, Ch. 399, L. 1979.

27-19-202. Preliminary injunction pending action for restraint of trade. Whenever any action, either civil or criminal, shall have been instituted in court in this state against any person for price fixing or regulating the production of any article of commerce or of the product of the soil, for consumption by the people, the court in which such action is pending is authorized to issue an injunction to restrain any such person from doing business in this state pending the final determination of said action so instituted.

History: En. Sec. 1, Ch. 93, L. 1905; re-en. Sec. 6654, Rev. C. 1907; re-en. Sec. 9254, R.C.M. 1921; re-en. Sec. 9254, R.C.M. 1935; amd. Sec. 56, Ch. 100, L. 1973; amd. Sec. 3, Ch. 138, L. 1975; R.C.M. 1947, 93-4215(1).

27-19-203. Preliminary injunction pending action by public service commission. When the public service commission is conducting an adjudicatory proceeding or formal investigation relating to continuation or interruption of service upon the motion of the consumer counsel or the interested person or his legal representative, a district court may, upon the application of the consumer counsel or the interested person or his legal representative, enter a restraining order against any person respondent in the adjudicatory proceeding or investigation. Such a restraining order may prohibit the respondent and his agents, employees, licensees, and assignees from acting in the manner complained of in the proceeding before the commission until the commission has rendered its decision in the matter. The restraining order may include an order to show cause why the order should not become an injunction for the duration of the proceeding before the commission.

History: En. Sec. 1, Ch. 93, L. 1905; re-en. Sec. 6654, Rev. C. 1907; re-en. Sec. 9254, R.C.M. 1921; re-en. Sec. 9254, R.C.M. 1935; amd. Sec. 56, Ch. 100, L. 1973; amd. Sec. 3, Ch. 138, L. 1975; R.C.M. 1947, 93-4215(2).

27-19-204. Issuance without bond. The injunction provided for in 27-19-202 shall issue without bond, upon the application of the county attorney of the county in which the action is pending or upon the application of the attorney general in the name of the state of Montana, upon a prima facie showing that an action described in 27-19-202 has been instituted and is pending.

History: En. Sec. 2, Ch. 93, L. 1905; re-en. Sec. 6655, Rev. C. 1907; re-en. Sec. 9255, R.C.M. 1921; re-en. Sec. 9255, R.C.M. 1935; amd. Sec. 57, Ch. 100, L. 1973; R.C.M. 1947, 93-4216; amd. Sec. 46, Ch. 12, L. 1979.

Part 3

Procedure for Obtaining Preliminary Injunction

27-19-301. Notice of application — hearing. (1) No preliminary injunction may be issued without reasonable notice to the adverse party of the time and place of the making of the application therefor.

(2) Before granting an injunction order, the court or judge shall make an order requiring cause to be shown, at a specified time and place, why the injunction should not be granted, and the adverse party may in the meantime be restrained as provided in 27-19-314.

History: En. Sec. 85, p. 59, Bannack Stat.; re-en. Sec. 114, p. 154, L. 1867; re-en. Sec. 131, p. 52, Cod. Stat. 1871; re-en. Sec. 173, p. 79, L. 1877; re-en. Sec. 173, 1st Div. Rev. Stat. 1879; re-en. Sec. 175, 1st Div. Comp. Stat. 1887; en. Sec. 873, C. Civ. Proc. 1895; re-en. Sec. 6645, Rev. C. 1907; re-en. Sec. 9245, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 528; re-en. Sec. 9245, R.C.M. 1935; R.C.M. 1947, 93-4206(part); (2)En. Sec. 3, Ch. 399, L. 1979; amd. Sec. 2, Ch. 399, L. 1979.

27-19-302. Repealed. Sec. 18, Ch. 399, L. 1979.

27-19-303. Time of granting injunction, evidence required. (1) The injunction order may be granted after the hearing at any time before judgment.

(2) Upon the hearing each party may present affidavits or oral testimony. An injunction order may not be granted on affidavits unless:

(a) they are duly verified; and

(b) the material allegations of the affidavits setting forth the grounds for the order are made positively and not upon information and belief.

(3) Upon the hearing of a contested application for an injunction order, a verified answer has the effect only of an affidavit.

History: (1), (2)En. Sec. 84, p. 58, Bannack Stat.; re-en. Sec. 113, p. 154, L. 1867; re-en. Sec. 130, p. 52, Cod. Stat. 1871; re-en. Sec. 172, p. 79, L. 1877; re-en. Sec. 172, 1st Div. Rev. Stat. 1879; re-en. Sec. 174, 1st Div. Comp. Stat. 1887; amd. Sec. 872, C. Civ. Proc. 1895; re-en. Sec. 6644, Rev. C. 1907; re-en. Sec. 9244, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 527; re-en. Sec. 9244, R.C.M. 1935; Sec. 93-4205, R.C.M. 1947; (3)En. Sec. 877, C. Civ. Proc. 1895; re-en. Sec. 6649, Rev. C. 1907; re-en. Sec. 9249, R.C.M. 1921; re-en. Sec. 9249, R.C.M. 1935; Sec. 93-4210, R.C.M. 1947; R.C.M. 1947, 93-4205(part), 93-4210(part); amd. Sec. 47, Ch. 12, L. 1979; amd. Sec. 4, Ch. 399, L. 1979.

27-19-304. Repealed. Sec. 18, Ch. 399, L. 1979.

27-19-305. Renumbered 27-19-314 by Code Commissioner, 1979.

27-19-306. Security for damages. (1) On granting an injunction or restraining order, the court or judge shall require a written undertaking to be given by the applicant, in such sum as the court considers proper, for the payment of such costs and damages as may be incurred or suffered by any arty who is found to have been wrongfully enjoined or restrained. The ndertaking may not be required in domestic disputes or when the state or state agency, a county or subdivision thereof, or a municipal corporation the party seeking the injunction or restraining order. In any case, the court its discretion may waive the undertaking in the interest of justice.

(2) Within 5 days after the service of the injunction, the party enjoined ay except to the sufficiency of the sureties. If he fails to do so, he waives ll objections to them. When excepted to, the applicant's sureties, upon otice to the party enjoined of not less than 2 or more than 5 days, must stify before a judge or clerk in the same manner as upon bail on arrest. If hey fail to justify or if others in their place fail to justify at the time and lace appointed, the order granting the injunction must be dissolved.

History: En. Sec. 86, p. 59, Bannack Stat.; re-en. Sec. 115, p. 154, L. 1867; re-en. Sec. 132, p. 2, Cod. Stat. 1871; re-en. Sec. 174, p. 79, L. 1877; re-en. Sec. 174, 1st Div. Rev. Stat. 1879; re-en. ec. 176, 1st Div. Comp. Stat. 1887; en. Sec. 874, C. Civ. Proc. 1895; re-en. Sec. 6646, Rev. C. 1907; -en. Sec. 9246, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 529; re-en. Sec. 9246, R.C.M. 1935; amd. Sec. 3, Ch. 535, L. 1975; R.C.M. 1947, 93-4207; amd. Sec. 48, Ch. 12, L. 1979; amd. Sec. 8, Ch. 399, . 1979.

27-19-307. New undertaking for security following hearing. On hearing to show cause, the court or judge may require a new undertaking, the same or a different sum, to be given by the party who obtained the rder, with like sureties and to the like effect as upon granting of the original rder. The persons executing the new undertaking become liable thereon as they had executed it upon the granting of the original order. The persons ho executed the original undertaking remain liable thereon until the new ndertaking is given and approved, and no longer.

History: En. Sec. 876, C. Civ. Proc. 1895; re-en. Sec. 6648, Rev. C. 1907; re-en. Sec. 9248, R.C.M. 921; re-en. Sec. 9248, R.C.M. 1935; R.C.M. 1947, 93-4209(part); amd. Sec. 13, Ch. 399, L. 1979; CA 1979, 27-19-313; redes. 27-19-307 by Code Commissioner, 1979.

27-19-308 through 27-19-310 reserved.

27-19-311. Repealed. Sec. 18, Ch. 399, L. 1979.

27-19-312. Renumbered 27-19-303(3) by Code Commissioner, 979.

27-19-313. Renumbered 27-19-307 by Code Commissioner, 979.

27-19-314. Temporary restraining order. Where an application for n injunction is made upon notice or an order to show cause, either before r after answer, the court or judge may enjoin the adverse party, until the earing and decision of the application, by an order which is called a temporary restraining order.

History: En. Sec. 85, p. 59, Bannack Stat.; re-en. Sec. 114, p. 154, L. 1867; re-en. Sec. 131, p. 2, Cod. Stat. 1871; re-en. Sec. 173, p. 79, L. 1877; re-en. Sec. 173, 1st Div. Rev. Stat. 1879; re-en. c. 175, 1st Div. Comp. Stat. 1887; en. Sec. 873, C. Civ. Proc. 1895; re-en. Sec. 6645, Rev. C. 1907; -en. Sec. 9245, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 528; re-en. Sec. 9245, R.C.M. 1935; R.C.M. 47, 93-4206(part); amd. Sec. 5, Ch. 399, L. 1979; Sec. 27-19-305, MCA 1979; redes. 27-19-314 by ode Commissioner, 1979.

27-19-315. When restraining order may be granted without notice. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that a delay would cause immediate and irreparable injury to the applicant before the adverse party or his attorney could be heard in opposition; and

(2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons supporting his claim that notice should not be required.

History: En. Sec. 7, Ch. 399, L. 1979.

27-19-316. Contents and filing of restraining order granted without notice. Each temporary restraining order granted without notice must:

(1) be endorsed with the date and hour of its issuance;

(2) be filed immediately in the clerk's office and entered in the record;

(3) define the injury and state why such injury is irreparable and why the order was granted without notice; and

(4) expire by its terms within such time after entry, not to exceed 10 days, as the court or judge fixes.

History: En. Sec. 9, Ch. 399, L. 1979.

27-19-317. Extension of expiration date. The time fixed in the order for its expiration may be extended, for good cause shown, for a like period or, if the party against whom the order is directed consents, for a longer period. The reasons for the extension must be entered in the record.

History: En. Sec. 10, Ch. 399, L. 1979.

27-19-318. Application for injunction to be heard without delay. Whenever a temporary restraining order is granted without notice, the application for an injunction must be set for hearing at the earliest possible time and takes precedence over all matters except older matters of the same character. At the hearing the party who obtained the temporary restraining order shall proceed with the application for an injunction, or if he does not do so, the court or judge shall dissolve the temporary restraining order.

History: En. Sec. 11, Ch. 399, L. 1979.

27-19-319. Motion to dissolve or modify restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice as the court or judge may prescribe, the adverse party may appear and move that the order be dissolved or modified. The court shall hear and determine such motion as expeditiously as the ends of justice require.

History: En. Sec. 12, Ch. 399, L. 1979.

Part 4

Dissolution or Modification of Preliminary Injunction

27-19-401. Application to dissolve or modify injunction. The party enjoined may apply to the judge who granted the injunction order or to the court in which the action is brought to dissolve or modify the same. The application may be made upon reasonable notice or upon an order to show cause returnable at a specified time or immediately after service thereof. The application must be supported by an affidavit showing that there is not sufficient ground for the injunction to continue or that the scope of the injunction is too broad.

History: En. Sec. 89, p. 59, Bannack Stat.; re-en. Sec. 118, p. 155, L. 1867; re-en. Sec. 135, p. 3, Cod. Stat. 1871; re-en. Sec. 177, p. 81, L. 1877; re-en. Sec. 177, 1st Div. Rev. Stat. 1879; re-en. ec. 179, 1st Div. Comp. Stat. 1887; amd. Sec. 878, C. Civ. Proc. 1895; re-en. Sec. 6650, Rev. C. 1907; e-en. Sec. 9250, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 532; re-en. Sec. 9250, R.C.M. 1935; R.C.M. 947, 93-4211(part); amd. Sec. 14, Ch. 399, L. 1979.

27-19-402. Repealed. Sec. 18, Ch. 399, L. 1979.

27-19-403. New undertaking for security following hearing. Upon the hearing, the court or judge may require a new undertaking, in the ame or a different sum, to be given by the party who obtained the order, with like sureties and to the like effect as the undertaking executed upon the ranting of the original order. The persons executing the new undertaking become liable thereon as if they had executed it upon the granting of the riginal order. The persons who executed the original undertaking remain liable thereon until the new undertaking is given and approved, and no longer.

History: En. Sec. 876, C. Civ. Proc. 1895; re-en. Sec. 6648, Rev. C. 1907; re-en. Sec. 9248, R.C.M. 921; re-en. Sec. 9248, R.C.M. 1935; R.C.M. 1947, 93-4209(part); amd. Sec. 50, Ch. 12, L. 1979; amd. ec. 15, Ch. 399, L. 1979.

27-19-404. When injunction dissolved or modified. If upon the hearing it satisfactorily appears that there are not sufficient grounds for the njunction order, the order must be dissolved; or if it satisfactorily appears hat the extent of the injunction order is too great, the order must be modified.

History: Ap. p. Sec. 90, p. 60, Bannack Stat.; re-en. Sec. 119, p. 155, L. 1867; re-en. Sec. 136, . 53, Cod. Stat. 1871; re-en. Sec. 178, p. 81, L. 1877; re-en. Sec. 178, 1st Div. Rev. Stat. 1879; re-en. ec. 180, 1st Div. Comp. Stat. 1887; re-en. Sec. 879, C. Civ. Proc. 1895; re-en. Sec. 6651, Rev. C. 907; re-en. Sec. 9251, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 533; re-en. Sec. 9251, R.C.M. 1935; Sec. 3-4212, R.C.M. 1947; Ap. p. Sec. 876, C. Civ. Proc. 1895; re-en. Sec. 6648, Rev. C. 1907; re-en. Sec. 248, R.C.M. 1921; re-en. Sec. 9248, R.C.M. 1935; R.C.M. 1947, 93-4209(part), 93-4212; amd. Sec. 1, Ch. 12, L. 1979.

27-19-405. Enjoined party's undertaking for security upon dissolution. If the injunction order is dissolved because the alleged injury is not irreparable and is capable of being adequately compensated for in money, he court or judge shall require the enjoined party to execute an undertaking n such form and amount and with such sureties as the court or judge may direct, conditioned to indemnify the party who obtained the injunction order against loss sustained by reason of the dissolution.

History: En. Sec. 876, C. Civ. Proc. 1895; re-en. Sec. 6648, Rev. C. 1907; re-en. Sec. 9248, R.C.M. 921; re-en. Sec. 9248, R.C.M. 1935; R.C.M. 1947, 93-4209(part); amd. Sec. 52, Ch. 12, L. 1979; amd. ec. 16, Ch. 399, L. 1979.

27-19-406. Costs upon dissolution. Where an injunction order is granted and the same is afterward dissolved upon application of the party enjoined thereby, the court or judge to whom the application to dissolve is made may award as costs of the application, against the party who obtained the injunction and in favor of the party applying, such sum as to the cour or judge may appear just, not less than $10 or more than $100.

History: En. Sec. 880, C. Civ. Proc. 1895; re-en. Sec. 6652, Rev. C. 1907; re-en. Sec. 9252, R.C.M 1921; re-en. Sec. 9252, R.C.M. 1935; R.C.M. 1947, 93-4213; amd. Sec. 17, Ch. 399, L. 1979.

CHAPTER 20

RECEIVERS

Part 1 — General Provisions

Section
27-20-101. Definition of property.
27-20-102. When and by whom receiver appointed.
27-20-103. Appointment of receiver upon dissolution of corporation.

Part 2 — Appointment Procedure

27-20-201. Notice of application for appointment before judgment.
27-20-202. Interested persons not to be appointed without consent.
27-20-203. Security to cover damages caused by appointment upon ex parte application.

Part 3 — Action by Receivers—Removal

27-20-301. Oath and undertaking to faithfully discharge duties.
27-20-302. Powers of receiver.
27-20-303. Investment of funds.
27-20-304. Removal of receiver.

Part 1

General Provisions

27-20-101. Definition of property. The word "property", used in this chapter, includes the rents, profits, or other income and the increase of real or personal property.

History: En. Sec. 951, C. Civ. Proc. 1895; re-en. Sec. 6699, Rev. C. 1907; re-en. Sec. 9302, R.C.M. 1921; re-en. Sec. 9302, R.C.M. 1935; R.C.M. 1947, 93-4402(part).

27-20-102. When and by whom receiver appointed. A receiver may be appointed by the court in which an action is pending or by the judge thereof:

(1) in an action by a vendor to vacate a fraudulent purchase of property, by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff or of any party whose right to or interest in the property or fund or the proceeds thereof is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured;

(2) in an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property

is in danger of being lost, removed, or materially injured or that the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt;

(3) after judgment, to carry the judgment into effect;

(4) after judgment, to dispose of the property according to the judgment or to preserve it during the pendency of an appeal; or in proceedings in aid of execution, when an execution has been returned unsatisfied or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

(5) in all other cases where, before February 1, 1864, receivers have been appointed by the usages of courts of equity.

History: En. Sec. 116, p. 67, Bannack Stat.; re-en. Sec. 143, p. 160, L. 1867; re-en. Sec. 179, p. 2, Cod. Stat. 1871; en. Sec. 221, p. 93, L. 1877; re-en. Sec. 221, 1st Div. Rev. Stat. 1879; re-en. Sec. 29, 1st Div. Comp. Stat. 1887; re-en. Sec. 950, C. Civ. Proc. 1895; re-en. Sec. 6698, Rev. C. 1907; re-en. Sec. 9301, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 564; re-en. Sec. 9301, R.C.M. 1935; amd. Sec. 42, Ch. 300, L. 1967; R.C.M. 1947, 93-4401.

27-20-103. Appointment of receiver upon dissolution of corporation. Upon the dissolution of any corporation, the district court of the county in which the corporation carries on its business or has its principal place of business, on application of any creditor of the corporation or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof, to collect the debts and property due and belonging to the corporation, to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members.

History: En. Sec. 222, p. 94, L. 1877; re-en. Sec. 222, 1st Div. Rev. Stat. 1879; re-en. Sec. 230, 1st Div. Comp. Stat. 1887; re-en. Sec. 952, C. Civ. Proc. 1895; re-en. Sec. 6700, Rev. C. 1907; re-en. Sec. 9303, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 565; re-en. Sec. 9303, R.C.M. 1935; R.C.M. 1947, 3-4403.

Part 2

Appointment Procedure

27-20-201. Notice of application for appointment before judgment. Notice of an application for the appointment of a receiver in an action before judgment therein must be given to the adverse party unless he has failed to appear in the action and the time limited for his appearance has expired or unless it shall appear to the court that there is immediate danger that the property or fund will be removed beyond the jurisdiction of the court or lost, materially injured, destroyed, or unlawfully disposed of.

History: En. Sec. 951, C. Civ. Proc. 1895; re-en. Sec. 6699, Rev. C. 1907; re-en. Sec. 9302, R.C.M. 921; re-en. Sec. 9302, R.C.M. 1935; R.C.M. 1947, 93-4402(part).

27-20-202. Interested persons not to be appointed without consent. No party, attorney, or person interested in an action can be appointed receiver therein without the written consent of the parties, filed with the clerk.

History: En. Sec. 223, p. 94, L. 1877; re-en. Sec. 223, 1st Div. Rev. Stat. 1879; re-en. Sec. 231, 1st Div. Comp. Stat. 1887; re-en. Sec. 953, C. Civ. Proc. 1895; re-en. Sec. 6701, Rev. C. 1907; re-en.

Sec. 9304, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 566; re-en. Sec. 9304, R.C.M. 1935; R.C.M. 194 93-4404(part).

27-20-203. Security to cover damages caused by appointmen upon ex parte application. If a receiver be appointed upon an ex part application, the court, before making the order, may require from the applicant an undertaking, with sufficient sureties, in an amount to be fixed by th court, to the effect that the applicant will pay to the defendant all damage he may sustain by reason of the appointment of such receiver and the entr by him upon his duties, in case the applicant shall have procured suc appointment wrongfully, maliciously, or without sufficient cause; and th court may, in its discretion, at any time after said appointment, require a additional undertaking.

History: En. Sec. 223, p. 94, L. 1877; re-en. Sec. 223, 1st Div. Rev. Stat. 1879; re-en. Sec. 231 1st Div. Comp. Stat. 1887; re-en. Sec. 953, C. Civ. Proc. 1895; re-en. Sec. 6701, Rev. C. 1907; re-en Sec. 9304, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 566; re-en. Sec. 9304, R.C.M. 1935; R.C.M. 194 93-4404(part).

Part 3

Action by Receivers — Removal

27-20-301. Oath and undertaking to faithfully discharg duties. Before entering upon his duties, the receiver must be sworn to perform them faithfully and shall execute an undertaking, with one or mor sureties approved by the court or judge, to such person and in such sum a the court or judge may direct, to the effect that he will faithfully discharg the duties of receiver in the action and obey the orders of the court therein The court may at any time direct him to give new bonds with new suretie with the like effect.

History: En. Sec. 224, p. 94, L. 1877; re-en. Sec. 224, 1st Div. Rev. Stat. 1879; re-en. Sec. 232 1st Div. Comp. Stat. 1887; re-en. Sec. 954, C. Civ. Proc. 1895; re-en. Sec. 6702, Rev. C. 1907; re-en Sec. 9305, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 567; re-en. Sec. 9305, R.C.M. 1935; R.C.M. 1947 93-4405(part); amd. Sec. 53, Ch. 12, L. 1979.

27-20-302. Powers of receiver. The receiver has, under the contro of the court, power to:

(1) bring and defend actions in his own name, as receiver;

(2) take and keep possession of the property;

(3) receive rents, collect debts, and compound for and compromise the same;

(4) make transfers; and

(5) generally do such acts respecting the property as the court may authorize.

History: En. Sec. 225, p. 94, L. 1877; re-en. Sec. 225, 1st Div. Rev. Stat. 1879; re-en. Sec. 233 1st Div. Comp. Stat. 1887; re-en. Sec. 955, C. Civ. Proc. 1895; re-en. Sec. 6703, Rev. C. 1907; re-en Sec. 9306, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 568; re-en. Sec. 9306, R.C.M. 1935; R.C.M. 1947 93-4406.

27-20-303. Investment of funds. Funds in the hands of a receiver may be invested upon interest, by order of the court, but no such order can be made except upon the consent of all the parties to the action.

History: En. Sec. 226, p. 94, L. 1877; re-en. Sec. 226, 1st Div. Rev. Stat. 1879; re-en. Sec. 234 1st Div. Comp. Stat. 1887; re-en. Sec. 956, C. Civ. Proc. 1895; re-en. Sec. 6704, Rev. C. 1907; re-en

Sec. 9307, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 569; re-en. Sec. 9307, R.C.M. 1935; R.C.M. 1947, 93-4407.

27-20-304. Removal of receiver. The court may at any time remove a receiver.

History: En. Sec. 224, p. 94, L. 1877; re-en. Sec. 224, 1st Div. Rev. Stat. 1879; re-en. Sec. 232, 1st Div. Comp. Stat. 1887; re-en. Sec. 954, C. Civ. Proc. 1895; re-en. Sec. 6702, Rev. C. 1907; re-en. Sec. 9305, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 567; re-en. Sec. 9305, R.C.M. 1935; R.C.M. 1947, 93-4405(part).

CHAPTERS 21 THROUGH 24

RESERVED

CHAPTER 25

CERTIORARI — WRIT OF REVIEW

Part 1 — General Provisions

Section

27-25-101. Name of writ.
27-25-102. When and by whom granted.
27-25-103. Application of rules of procedure.

Part 2 — Procedure for Obtaining and Serving Writ

27-25-201. Application for writ — notice.
27-25-202. Contents of writ.
27-25-203. Stay of proceedings.
27-25-204. Service of writ.
27-25-205. To whom writ directed — return.

Part 3 — Procedure Upon Return of Writ

27-25-301. Time for return and hearing.
27-25-302. Correction of defective return.
27-25-303. Scope of review upon writ.
27-25-304. Hearing and judgment.
27-25-305. Copy of judgment to inferior tribunal or officer.

Part 1

General Provisions

27-25-101. Name of writ. The writ of certiorari may be denominated the writ of review.

History: En. Sec. 371, p. 121, Bannack Stat.; re-en. Sec. 430, p. 222, L. 1867; re-en. Sec. 506, . 139, Cod. Stat. 1871; re-en. Sec. 536, p. 179, L. 1877; re-en. Sec. 536, 1st Div. Rev. Stat. 1879; re-en. Sec. 554, 1st Div. Comp. Stat. 1887; re-en. Sec. 1940, C. Civ. Proc. 1895; re-en. Sec. 7202, Rev. C. 1907; re-en. Sec. 9836, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1067; re-en. Sec. 9836, R.C.M. 1935; R.C.M. 1947, 93-9001.

27-25-102. When and by whom granted. A writ of review may be granted by:

(1) the supreme court and any justice of the supreme court, in proceedings for contempt in the district court; or

(2) the supreme court or the district court or any judge thereof, when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer and there is no appeal or, in the judgment of the court, any plain, speedy, and adequate remedy.

History: En. Sec. 372, p. 121, Bannack Stat.; re-en. Sec. 431, p. 222, L. 1867; re-en. Sec. 507, p. 139, Cod. Stat. 1871; re-en. Sec. 537, p. 180, L. 1877; re-en. Sec. 537, 1st Div. Rev. Stat. 1879; re-en. Sec. 555, 1st Div. Comp. Stat. 1887; re-en. Sec. 1941, C. Civ. Proc. 1895; re-en. as amd. Sec. 7203, Rev. C. 1907; re-en. Sec. 9837, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1068; re-en. Sec. 9837, R.C.M. 1935; R.C.M. 1947, 93-9002.

27-25-103. Application of rules of procedure. Except as otherwise provided in this chapter, the provisions of Title 25 are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter. The provisions of Title 25 relative to new trials and appeals, except insofar as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

History: Ap. p. Sec. 2000, C. Civ. Proc. 1895; re-en. Sec. 7232, Rev. C. 1907; re-en. Sec. 9866, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1109; re-en. Sec. 9866, R.C.M. 1935; Sec. 93-3902, R.C.M. 1947; Ap. p. Sec. 2001, C. Civ. Proc. 1895; re-en. Sec. 7233, Rev. C. 1907; re-en. Sec. 9867, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1110; re-en. Sec. 9867, R.C.M. 1935; Sec. 93-9303, R.C.M. 1947; R.C.M. 1947, 93-9302(part), 93-9303(part); amd. Sec. 54, Ch. 12, L. 1979.

Part 2

Procedure for Obtaining and Serving Writ

27-25-201. Application for writ — notice. The application must be made on affidavit by the party beneficially interested; and the court may require a notice of the application to be given to the adverse party, grant an order to show cause why it should not be allowed, or grant the writ without notice.

History: En. Sec. 373, p. 121, Bannack Stat.; re-en. Sec. 432, p. 222, L. 1867; re-en. Sec. 508, p. 139, Cod. Stat. 1871; re-en. Sec. 538, p. 180, L. 1877; re-en. Sec. 538, 1st Div. Rev. Stat. 1879; re-en. Sec. 556, 1st Div. Comp. Stat. 1887; re-en. Sec. 1942, C. Civ. Proc. 1895; re-en. Sec. 7204, Rev. C. 1907; re-en. Sec. 9838, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1069; re-en. Sec. 9838, R.C.M. 1935; R.C.M. 1947, 93-9003.

27-25-202. Contents of writ. The writ of review must command the party to whom it is directed to certify fully to the court issuing the writ, at a specified time and place, a transcript of the record and proceedings (describing or referring to them with convenient certainty), that the same may be reviewed by the court, and require the party, in the meantime, to desist from further proceedings in the matter to be reviewed.

History: En. Sec. 375, p. 121, Bannack Stat.; re-en. Sec. 434, p. 222, L. 1867; re-en. Sec. 510, p. 139, Cod. Stat. 1871; re-en. Sec. 540, p. 180, L. 1877; re-en. Sec. 540, 1st Div. Rev. Stat. 1879; re-en. Sec. 558, 1st Div. Comp. Stat. 1887; re-en. Sec. 1944, C. Civ. Proc. 1895; re-en. Sec. 7206, Rev. C. 1907; re-en. Sec. 9840, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1071; re-en. Sec. 9840, R.C.M. 1935; R.C.M. 1947, 93-9005.

27-25-203. Stay of proceedings. If a stay of proceedings be not intended, the words requiring the stay must be omitted from the writ. These vords may be inserted or omitted, in the sound discretion of the court or udge; but if omitted, the power of the inferior court or officer is not sus-ended or the proceedings stayed.

History: En. Sec. 376, p. 122, Bannack Stat.; re-en. Sec. 435, p. 223, L. 1867; re-en. Sec. 511, . 140, Cod. Stat. 1871; re-en. Sec. 541, p. 180, L. 1877; re-en. Sec. 541, 1st Div. Rev. Stat. 1879; -en. Sec. 559, 1st Div. Comp. Stat. 1887; re-en. Sec. 1945, C. Civ. Proc. 1895; re-en. Sec. 7207, Rev. . 1907; re-en. Sec. 9841, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1072; re-en. Sec. 9841, R.C.M. 1935; .C.M. 1947, 93-9006.

27-25-204. Service of writ. The writ must be served in the manner s a summons in civil action, except when otherwise expressly directed by the ourt or judge.

History: En. Sec. 377, p. 122, Bannack Stat.; re-en. Sec. 436, p. 223, L. 1867; re-en. Sec. 512, . 140, Cod. Stat. 1871; re-en. Sec. 542, p. 180, L. 1877; re-en. Sec. 542, 1st Div. Rev. Stat. 1879; -en. Sec. 560, 1st Div. Comp. Stat. 1887; re-en. Sec. 1946, C. Civ. Proc. 1895; re-en. Sec. 7208, Rev. . 1907; re-en. Sec. 9842, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1073; re-en. Sec. 9842, R.C.M. 1935; .C.M. 1947, 93-9007.

27-25-205. To whom writ directed — return. The writ may be irected to the inferior tribunal, board, or officer or to any other person having the custody of the record or proceedings to be certified. When directed a tribunal, the clerk, if there be one, must return the writ with the transcript required.

History: En. Sec. 374, p. 121, Bannack Stat.; re-en. Sec. 433, p. 222, L. 1867; re-en. Sec. 509, . 139, Cod. Stat. 1871; re-en. Sec. 539, p. 180, L. 1877; re-en. Sec. 539, 1st Div. Rev. Stat. 1879; -en. Sec. 557, 1st Div. Comp. Stat. 1887; re-en. Sec. 1943, C. Civ. Proc. 1895; re-en. Sec. 7205, Rev. . 1907; re-en. Sec. 9839, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1070; re-en. Sec. 9839, R.C.M. 1935; .C.M. 1947, 93-9004.

Part 3

Procedure Upon Return of Writ

27-25-301. Time for return and hearing. Writs of review issued by e supreme court or by a district court or district judge may, in the discreon of the court issuing the writ, be made returnable and a hearing thereon e heard at any time.

History: En. Sec. 565, p. 185, L. 1877; re-en. Sec. 565, 1st Div. Rev. Stat. 1879; re-en. Sec. 583, t Div. Comp. Stat. 1887; amd. Sec. 1990, C. Civ. Proc. 1895; re-en. Sec. 7231, Rev. C. 1907; re-en. ec. 9865, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1108; re-en. Sec. 9865, R.C.M. 1935; R.C.M. 1947, 3-9301(part).

27-25-302. Correction of defective return. If the return of the writ e defective, the court or judge may order a further return to be made.

History: En. Sec. 379, p. 122, Bannack Stat.; re-en. Sec. 438, p. 223, L. 1867; re-en. Sec. 514, 140, Cod. Stat. 1871; re-en. Sec. 544, p. 181, L. 1877; re-en. Sec. 544, 1st Div. Rev. Stat. 1879; -en. Sec. 562, 1st Div. Comp. Stat. 1887; re-en. Sec. 1948, C. Civ. Proc. 1895; re-en. Sec. 7210, Rev. . 1907; re-en. Sec. 9844, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1075; re-en. Sec. 9844, R.C.M. 1935; .C.M. 1947, 93-9009(part).

27-25-303. Scope of review upon writ. The review upon this writ annot be extended further than to determine whether the inferior tribunal, oard, or officer has regularly pursued the authority of such tribunal, board, r officer.

History: En. Sec. 378, p. 122, Bannack Stat.; re-en. Sec. 437, p. 223, L. 1867; re-en. Sec. 513, 140, Cod. Stat. 1871; re-en. Sec. 543, p. 181, L. 1877; re-en. Sec. 543, 1st Div. Rev. Stat. 1879;

re-en. Sec. 561, 1st Div. Comp. Stat. 1887; re-en. Sec. 1947, C. Civ. Proc. 1895; re-en. Sec. 7209, Re C. 1907; re-en. Sec. 9843, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1074; re-en. Sec. 9843, R.C.M. 193 R.C.M. 1947, 93-9008.

27-25-304. Hearing and judgment. When a full return has bee made, the court or judge must hear the parties, or such of them as ma attend for that purpose, and may thereupon give judgment, either affirmin annulling, or modifying the proceedings below.

History: En. Sec. 379, p. 122, Bannack Stat.; re-en. Sec. 438, p. 223, L. 1867; re-en. Sec. 51 p. 140, Cod. Stat. 1871; re-en. Sec. 544, p. 181, L. 1877; re-en. Sec. 544, 1st Div. Rev. Stat. 187 re-en. Sec. 562, 1st Div. Comp. Stat. 1887; re-en. Sec. 1948, C. Civ. Proc. 1895; re-en. Sec. 7210, Re C. 1907; re-en. Sec. 9844, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1075; re-en. Sec. 9844, R.C.M. 193 R.C.M. 1947, 93-9009(part).

27-25-305. Copy of judgment to inferior tribunal or officer. A copy of the judgment, signed by the clerk, must be transmitted to th inferior tribunal, board, or officer having the custody of the record or proceeding certified upon.

History: En. Sec. 380, p. 122, Bannack Stat.; re-en. Sec. 439, p. 223, L. 1867; re-en. Sec. 51 p. 140, Cod. Stat. 1871; re-en. Sec. 545, p. 181, L. 1877; re-en. Sec. 545, 1st Div. Rev. Stat. 187 re-en. Sec. 563, 1st Div. Comp. Stat. 1887; re-en. Sec. 1949, C. Civ. Proc. 1895; re-en. Sec. 7211, Re C. 1907; re-en. Sec. 9845, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1076; re-en. Sec. 9845, R.C.M. 193 R.C.M. 1947, 93-9010.

CHAPTER 26

MANDAMUS — WRIT OF MANDATE

Part 1 — General Provisions

Section

27-26-101. Name of writ.
27-26-102. When and by whom issued.
27-26-103. Application of rules of procedure.

Part 2 — Procedure for Obtaining, Serving, and Enforcing Writ

27-26-201. Application for writ.
27-26-202. Notice of application.
27-26-203. Form and content of writ.
27-26-204. Factors that determine whether writ peremptory or alternative.
27-26-205. Service of writ.
27-26-206. Enforcement of writ — penalty.

Part 3 — Procedure Upon Return of Writ

27-26-301. Time for return and hearing.
27-26-302. Answer of adverse party.
27-26-303. Jury trial.
27-26-304. Applicant's response to answer.
27-26-305. Motion for new trial.
27-26-306. Argument to proceed if no new trial.
27-26-307. Procedure when there is no answer or no material issue of fact.

Part 4 — Judgment

27-26-401. Default not permitted.

7-26-402. Judgment for applicant.
7-26-403. Officers not to be personally liable.

Part 1

General Provisions

27-26-101. Name of writ. The writ of mandamus may be denominated a writ of mandate.

History: En. Sec. 382, p. 122, Bannack Stat.; re-en. Sec. 441, p. 224, L. 1867; re-en. Sec. 517, . 141, Cod. Stat. 1871; re-en. Sec. 547, p. 181, L. 1877; re-en. Sec. 547, 1st Div. Rev. Stat. 1879; e-en. Sec. 565, 1st Div. Comp. Stat. 1887; re-en. Sec. 1960, C. Civ. Proc. 1895; re-en. Sec. 7213, Rev. . 1907; re-en. Sec. 9847, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1084; re-en. Sec. 9847, R.C.M. 1935; .C.M. 1947, 93-9101.

27-26-102. When and by whom issued. (1) It may be issued by the upreme court or the district court or any judge of the district court to any nferior tribunal, corporation, board, or person to compel the performance of n act which the law specially enjoins as a duty resulting from an office, rust, or station or to compel the admission of a party to the use and enjoynent of a right or office to which he is entitled and from which he is unlawully precluded by such inferior tribunal, corporation, board, or person.

(2) The writ must be issued in all cases where there is not a plain, peedy, and adequate remedy in the ordinary course of law.

History: (1)En. Sec. 383, p. 122, Bannack Stat.; amd. Sec. 442, p. 224, L. 1867; re-en. Sec. 518, . 141, Cod. Stat. 1871; re-en. Sec. 548, p. 181, L. 1877; re-en. Sec. 548, 1st Div. Rev. Stat. 1879; e-en. Sec. 566, 1st Div. Comp. Stat. 1887; amd. Sec. 1961, C. Civ. Proc. 1895; re-en. Sec. 7214, Rev. . 1907; re-en. Sec. 9848, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1085; re-en. Sec. 9848, R.C.M. 1935; ec. 93-9102, R.C.M. 1947; (2)En. Sec. 384, p. 123, Bannack Stat.; re-en. Sec. 443, p. 224, L. 1867; e-en. Sec. 519, p. 141, Cod. Stat. 1871; re-en. Sec. 549, p. 181, L. 1877; re-en. Sec. 549, 1st Div. ev. Stat. 1879; re-en. Sec. 567, 1st Div. Comp. Stat. 1887; amd. Sec. 1962, C. Civ. Proc. 1895; re-en. ec. 7215, Rev. C. 1907; re-en. Sec. 9849, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1086; re-en. Sec. 9849, .C.M. 1935; Sec. 93-9103, R.C.M. 1947; R.C.M. 1947, 93-9102, 93-9103(part).

27-26-103. Application of rules of procedure. Except as otherwise rovided in this chapter, the provisions of Title 25 are applicable to and contitute the rules of practice in the proceedings mentioned in this chapter. The provisions of Title 25 relative to new trials and appeals, except insofar s they are inconsistent with the provisions of this chapter, apply to the proeedings mentioned in this chapter.

History: Ap. p. Sec. 2000, C. Civ. Proc. 1895; re-en. Sec. 7232, Rev. C. 1907; re-en. Sec. 9866, .C.M. 1921; Cal. C. Civ. Proc. Sec. 1109; re-en. Sec. 9866, R.C.M. 1935; Sec. 93-3902, R.C.M. 1947; p. p. Sec. 2001, C. Civ. Proc. 1895; re-en. Sec. 7233, Rev. C. 1907; re-en. Sec. 9867, R.C.M. 1921; al. C. Civ. Proc. Sec. 1110; re-en. Sec. 9867, R.C.M. 1935; Sec. 93-9303, R.C.M. 1947; R.C.M. 1947, 3-9302(part), 93-9303(part); amd. Sec. 55, Ch. 12, L. 1979.

Part 2

Procedure for Obtaining, Serving, and Enforcing Writ

27-26-201. Application for writ. The writ must be issued upon affidavit, on the application of the party beneficially interested.

History: En. Sec. 384, p. 123, Bannack Stat.; re-en. Sec. 443, p. 224, L. 1867; re-en. Sec. 519, . 141, Cod. Stat. 1871; re-en. Sec. 549, p. 181, L. 1877; re-en. Sec. 549, 1st Div. Rev. Stat. 1879;

re-en. Sec. 567, 1st Div. Comp. Stat. 1887; amd. Sec. 1962, C. Civ. Proc. 1895; re-en. Sec. 7215, Rev C. 1907; re-en. Sec. 9849, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1086; re-en. Sec. 9849, R.C.M. 1935 R.C.M. 1947, 93-9103(part).

27-26-202. Notice of application. The notice of the application when given, must be at least 10 days or a shorter time, in the discretion o the court or judge.

History: En. Sec. 386, p. 123, Bannack Stat.; re-en. Sec. 445, p. 224, L. 1867; re-en. Sec. 521 p. 142, Cod. Stat. 1871; re-en. Sec. 551, p. 182, L. 1877; re-en. Sec. 551, 1st Div. Rev. Stat. 1879 re-en. Sec. 569, 1st Div. Comp. Stat. 1887; amd. Sec. 1964, C. Civ. Proc. 1895; re-en. Sec. 7217, Rev C. 1907; re-en. Sec. 9851, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1088; re-en. Sec. 9851, R.C.M. 1935 R.C.M. 1947, 93-9105(part).

27-26-203. Form and content of writ. The writ may be either alternative or peremptory. The alternative writ must state generally the allegation against the party to whom it is directed and command such party, immediately after the receipt of the writ or at some other specified time, to do the act required to be performed or to show cause before the court, at a specified time and place, why he has not done so. The peremptory writ must be in a similar form, except that the words requiring the party to show cause why he has not done as commanded must be omitted and a return day inserted.

History: En. Sec. 385, p. 123, Bannack Stat.; re-en. Sec. 444, p. 224, L. 1867; re-en. Sec. 520, p. 141, Cod. Stat. 1871; re-en. Sec. 550, p. 181, L. 1877; re-en. Sec. 550, 1st Div. Rev. Stat. 1879; re-en. Sec. 568, 1st Div. Comp. Stat. 1887; amd. Sec. 1963, C. Civ. Proc. 1895; re-en. Sec. 7216, Rev. C. 1907; re-en. Sec. 9850, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1087; re-en. Sec. 9850, R.C.M. 1935; R.C.M. 1947, 93-9104.

27-26-204. Factors that determine whether writ peremptory or alternative. When an application to the court or judge is made without notice to the adverse party and the writ be allowed, the alternative must be first issued; but if the application be upon due notice and the writ be allowed, the peremptory may be issued in the first instance.

History: En. Sec. 386, p. 123, Bannack Stat.; re-en. Sec. 445, p. 224, L. 1867; re-en. Sec. 521, p. 142, Cod. Stat. 1871; re-en. Sec. 551, p. 182, L. 1877; re-en. Sec. 551, 1st Div. Rev. Stat. 1879; re-en. Sec. 569, 1st Div. Comp. Stat. 1887; amd. Sec. 1964, C. Civ. Proc. 1895; re-en. Sec. 7217, Rev. C. 1907; re-en. Sec. 9851, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1088; re-en. Sec. 9851, R.C.M. 1935; R.C.M. 1947, 93-9105(part).

27-26-205. Service of writ. The writ must be served in the same manner as a summons in a civil action, except when otherwise expressly directed by order of the court or judge. Service upon a majority of the members of any board or body is service upon the board or body, whether at the time of the service the board or body was in session or not.

History: En. Sec. 394, p. 124, Bannack Stat.; re-en. Sec. 453, p. 225, L. 1867; re-en. Sec. 529, p. 143, Cod. Stat. 1871; en. Sec. 559, p. 183, L. 1877; re-en. Sec. 559, 1st Div. Rev. Stat. 1879; re-en. Sec. 577, 1st Div. Comp. Stat. 1887; re-en. Sec. 1972, C. Civ. Proc. 1895; re-en. Sec. 7225, Rev. C. 1907; re-en. Sec. 9859, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1096; re-en. Sec. 9859, R.C.M. 1935; R.C.M. 1947, 93-9113.

27-26-206. Enforcement of writ — penalty. When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the court or judge that any member of such tribunal, corporation, or board or person upon whom the writ has been personally served has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding $1,000. In ase of persistence in a refusal of obedience, the court may order the party o be imprisoned until the writ is obeyed and may make any orders necessary nd proper for the complete enforcement of the writ.

History: En. Sec. 395, p. 124, Bannack Stat.; re-en. Sec. 454, p. 225, L. 1867; re-en. Sec. 530, . 143, Cod. Stat. 1871; re-en. Sec. 560, p. 183, L. 1877; re-en. Sec. 560, 1st Div. Rev. Stat. 1879; e-en. Sec. 578, 1st Div. Comp. Stat. 1887; amd. Sec. 1973, C. Civ. Proc. 1895; re-en. Sec. 7226, Rev. . 1907; re-en. Sec. 9860, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1097; re-en. Sec. 9860, R.C.M. 1935; .C.M. 1947, 93-9114.

Part 3

Procedure Upon Return of Writ

27-26-301. Time for return and hearing. Writs of mandate issued y the supreme court or by a district court or district judge may, in the dis- retion of the court issuing the writ, be made returnable and a hearing hereon be heard at any time.

History: En. Sec. 565, p. 185, L. 1877; re-en. Sec. 565, 1st Div. Rev. Stat. 1879; re-en. Sec. 583, st Div. Comp. Stat. 1887; amd. Sec. 1990, C. Civ. Proc. 1895; re-en. Sec. 7231, Rev. C. 1907; re-en. ec. 9865, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1108; re-en. Sec. 9865, R.C.M. 1935; R.C.M. 1947, 3-9301(part).

27-26-302. Answer of adverse party. On the return of the alterna- ive or the day on which the application for the writ is noticed, the party on hom the writ or notice has been served may show cause by answer, under ath, made in the same manner as an answer to a complaint in a civil action.

History: En. Sec. 387, p. 123, Bannack Stat.; re-en. Sec. 446, p. 224, L. 1867; re-en. Sec. 522, . 142, Cod. Stat. 1871; re-en. Sec. 552, p. 182, L. 1877; re-en. Sec. 552, 1st Div. Rev. Stat. 1879; -en. Sec. 570, 1st Div. Comp. Stat. 1887; amd. Sec. 1965, C. Civ. Proc. 1895; re-en. Sec. 7218, Rev. . 1907; re-en. Sec. 9852, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1089; re-en. Sec. 9852, R.C.M. 1935; .C.M. 1947, 93-9106.

27-26-303. Jury trial. (1) If an answer is made which raises a question s to a matter of fact essential to the determination of the motion and affect- ng the substantial rights of the parties, and upon the supposed truth of the llegation of which the application for the writ is based, the court or judge ay, in its or his discretion, order the question to be tried before a jury and ostpone the argument until the trial can be had. The question to be tried ust be distinctly stated in the order for trial. The order may also direct the ry to assess any damages which the applicant may have sustained if it finds or him.

(2) If the proceeding is in the district court or before a district judge, the rial must take place as in other cases. If a jury is required in the supreme ourt, a jury must be drawn and selected from the jury box of Lewis and lark County and the clerk of the district court of that county shall place he box in the custody of the clerk of the supreme court for that purpose. he conduct of the trial must be the same as in the district court, and the lerk of the supreme court has the same authority to issue process and enter rders and judgments as the district court clerk has in like cases.

History: En. Sec. 388, p. 123, Bannack Stat.; re-en. Sec. 447, p. 224, L. 1867; re-en. Sec. 523, 142, Cod. Stat. 1871; re-en. Sec. 553, p. 182, L. 1877; re-en. Sec. 553, 1st Div. Rev. Stat. 1879; -en. Sec. 571, 1st Div. Comp. Stat. 1887; en. Sec. 1966, C. Civ. Proc. 1895; re-en. Sec. 7219, Rev. . 1907; re-en. Sec. 9853, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1090; re-en. Sec. 9853, R.C.M. 1935; .C.M. 1947, 93-9107; amd. Sec. 56, Ch. 12, L. 1979.

27-26-304. Applicant's response to answer. On the trial the applicant is not precluded by the answer from any valid objection to its sufficiency and may contradict it by proof, either in direct denial or by way of avoidance.

History: En. Sec. 389, p. 123, Bannack Stat.; re-en. Sec. 448, p. 224, L. 1867; re-en. Sec. 524 p. 142, Cod. Stat. 1871; re-en. Sec. 554, p. 183, L. 1877; re-en. Sec. 554, 1st Div. Rev. Stat. 1879 re-en. Sec. 572, 1st Div. Comp. Stat. 1887; re-en. Sec. 1967, C. Civ. Proc. 1895; re-en. Sec. 7220, Rev C. 1907; re-en. Sec. 9854, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1091; re-en. Sec. 9854, R.C.M. 1935 R.C.M. 1947, 93-9108.

27-26-305. Motion for new trial. The motion for a new trial must be made in the court in which the issue of fact is tried.

History: En. Sec. 555, p. 183, L. 1877; re-en. Sec. 555, 1st Div. Rev. Stat. 1879; re-en. Sec. 573 1st Div. Comp. Stat. 1887; re-en. Sec. 1968, C. Civ. Proc. 1895; re-en. Sec. 7221, Rev. C. 1907; re-en Sec. 9855, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1092; re-en. Sec. 9855, R.C.M. 1935; R.C.M. 1947 93-9109.

27-26-306. Argument to proceed if no new trial. If no notice of a motion for a new trial be given or, if given, the motion be denied, the argument must proceed at any time the court or judge may direct.

History: En. Sec. 1969, C. Civ. Proc. 1895; re-en. Sec. 7222, Rev. C. 1907; re-en. Sec. 9856, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1093; re-en. Sec. 9856, R.C.M. 1935; R.C.M. 1947, 93-9110.

27-26-307. Procedure when there is no answer or no material issue of fact. If no answer be made, the case must be heard on the papers of the applicant. If the answer raises only questions of law or puts in issue immaterial statements not affecting the substantial right of the parties, the court or judge must proceed to hear or fix a day for hearing the argument of the case.

History: En. Sec. 392, p. 124, Bannack Stat.; re-en. Sec. 451, p. 225, L. 1867; re-en. Sec. 527, p. 143, Cod. Stat. 1871; amd. Sec. 557, p. 183, L. 1877; re-en. Sec. 557, 1st Div. Rev. Stat. 1879; re-en. Sec. 575, 1st Div. Comp. Stat. 1887; re-en. Sec. 1970, C. Civ. Proc. 1895; re-en. Sec. 7223, Rev. C. 1907; re-en. Sec. 9857, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1094; re-en. Sec. 9857, R.C.M. 1935; R.C.M. 1947, 93-9111.

Part 4

Judgment

27-26-401. Default not permitted. The writ cannot be granted by default. The case must be heard by the court or judge, whether the adverse party appear or not.

History: En. Sec. 386, p. 123, Bannack Stat.; re-en. Sec. 445, p. 224, L. 1867; re-en. Sec. 521, p. 142, Cod. Stat. 1871; re-en. Sec. 551, p. 182, L. 1877; re-en. Sec. 551, 1st Div. Rev. Stat. 1879; re-en. Sec. 569, 1st Div. Comp. Stat. 1887; amd. Sec. 1964, C. Civ. Proc. 1895; re-en. Sec. 7217, Rev. C. 1907; re-en. Sec. 9851, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1088; re-en. Sec. 9851, R.C.M. 1935; R.C.M. 1947, 93-9105(part).

27-26-402. Judgment for applicant. If judgment is given for the applicant:

(1) he may recover the damages which he has sustained, as found by the jury or as determined by the court or referees, if a reference was ordered, together with costs;

(2) an execution may issue for such damages and costs; and

(3) a peremptory mandate must be awarded without delay.

History: En. Sec. 393, p. 124, Bannack Stat.; re-en. Sec. 452, p. 225, L. 1867; re-en. Sec. 528, 143, Cod. Stat. 1871; re-en. Sec. 558, p. 183, L. 1877; re-en. Sec. 558, 1st Div. Rev. Stat. 1879; -en. Sec. 576, 1st Div. Comp. Stat. 1887; re-en. Sec. 1971, C. Civ. Proc. 1895; re-en. Sec. 7224, Rev. 1907; re-en. Sec. 9858, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1095; amd. Sec. 1, Ch. 5, L. 1925; -en. Sec. 9858, R.C.M. 1935; R.C.M. 1947, 93-9112(part); amd. Sec. 57, Ch. 12, L. 1979.

27-26-403. Officers not to be personally liable. In all cases where e respondent is a state, county, or municipal officer, all damages and costs, r either, which may be recovered or awarded shall be recovered and awarded gainst the state, county, or municipal corporation represented by such offi- er and not against such officer so appearing in said proceeding. The same all be a proper claim against the state or county or municipal corporation r which such officer shall have appeared and shall be paid as other claims gainst the state, county, or municipality are paid; but in all such cases, the urt shall first determine that the officer appeared and made defense in ch proceeding in good faith.

History: En. Sec. 393, p. 124, Bannack Stat.; re-en. Sec. 452, p. 225, L. 1867; re-en. Sec. 528, 143, Cod. Stat. 1871; re-en. Sec. 558, p. 183, L. 1877; re-en. Sec. 558, 1st Div. Rev. Stat. 1879; -en. Sec. 576, 1st Div. Comp. Stat. 1887; re-en. Sec. 1971, C. Civ. Proc. 1895; re-en. Sec. 7224, Rev. 1907; re-en. Sec. 9858, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1095; amd. Sec. 1, Ch. 5, L. 1925; -en. Sec. 9858, R.C.M. 1935; R.C.M. 1947, 93-9112(part).

CHAPTER 27

WRIT OF PROHIBITION

Part 1 — General Provisions

ction
-27-101. Definition and function of writ of prohibition.
-27-102. Issuance of writ.
-27-103. Form and content of writ.
-27-104. Application of procedure governing mandamus.

Part 1

General Provisions

27-27-101. Definition and function of writ of prohibition. The it of prohibition is the counterpart of the writ of mandate. It arrests the oceedings of any tribunal, corporation, board, or person, whether exercising nctions judicial or ministerial, when such proceedings are without or in cess of the jurisdiction of such tribunal, corporation, board, or person.

History: En. Sec. 561, p. 184, L. 1877; re-en. Sec. 561, 1st Div. Rev. Stat. 1879; re-en. Sec. 579, Div. Comp. Stat. 1887; amd. Sec. 1980, C. Civ. Proc. 1895; re-en. Sec. 7227, Rev. C. 1907; re-en. . 9861, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1102; re-en. Sec. 9861, R.C.M. 1935; R.C.M. 1947, 9201.

27-27-102. Issuance of writ. The same may be issued by the supreme urt or the district court or any district judge to any inferior tribunal or to corporation, board, or person in all cases where there is not a plain, speedy, and adequate remedy in the ordinary course of law. It is issued upon affidavit on the application of the person beneficially interested.

History: En. Sec. 562, p. 184, L. 1877; re-en. Sec. 562, 1st Div. Rev. Stat. 1879; re-en. Sec. 580 1st Div. Comp. Stat. 1887; amd. Sec. 1981, C. Civ. Proc. 1895; re-en. Sec. 7228, Rev. C. 1907; re-en Sec. 9862, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1103; re-en. Sec. 9862, R.C.M. 1935; R.C.M. 1947 93-9202.

27-27-103. Form and content of writ. The writ must be either alternative or peremptory. The alternative writ must state generally the allegatio against the party to whom it is directed and command such party to desis or refrain from further proceedings in the action or matter specified therei until the further order of the court or judge from which it is issued and t show cause before such court or judge, at a specified time and place, wh such party should not be absolutely restrained from any further proceeding in such action or matter. The peremptory writ must be in a similar form except that the words requiring the party to show cause why he should no be absolutely restrained, etc., must be omitted and a return day inserted.

History: En. Sec. 563, p. 184, L. 1877; re-en. Sec. 563, 1st Div. Rev. Stat. 1879; re-en. Sec. 581 1st Div. Comp. Stat. 1887; re-en. Sec. 1982, C. Civ. Proc. 1895; re-en. Sec. 7229, Rev. C. 1907; re-en Sec. 9863, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1104; re-en. Sec. 9863, R.C.M. 1935; R.C.M. 1947 93-9203.

27-27-104. Application of procedure governing mandamus. Th provisions of chapter 26, except 27-26-101, 27-26-102, 27-26-201, an 27-26-203, apply to this proceeding.

History: Ap. p. Sec. 564, p. 184, L. 1877; re-en. Sec. 564, 1st Div. Rev. Stat. 1879; re-en. Sec 582, 1st Div. Comp. Stat. 1887; re-en. Sec. 1983, C. Civ. Proc. 1895; re-en. Sec. 7230, Rev. C. 1907 re-en. Sec. 9864, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1105; re-en. Sec. 9864, R.C.M. 1935; Sec 93-9204, R.C.M. 1947; Ap. p. Sec. 565, p. 185, L. 1877; re-en. Sec. 565, 1st Div. Rev. Stat. 1879 re-en. Sec. 583, 1st Div. Comp. Stat. 1887; amd. Sec. 1990, C. Civ. Proc. 1895; re-en. Sec. 7231, Rev C. 1907; re-en. Sec. 9865, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1108; re-en. Sec. 9865, R.C.M. 1935 Sec. 93-9301, R.C.M. 1947; Ap. p. Sec. 2000, C. Civ. Proc. 1895; re-en. Sec. 7232, Rev. C. 1907; re-en Sec. 9866, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1109; re-en. Sec. 9866, R.C.M. 1935; Sec. 93-9302 R.C.M. 1947; Ap. p. Sec. 2001, C. Civ. Proc. 1895; re-en. Sec. 7233, Rev. C. 1907; re-en. Sec. 9867 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1110; re-en. Sec. 9867, R.C.M. 1935; Sec. 93-9303, R.C.M. 1947 R.C.M. 1947, 93-9204, 93-9301(part), 93-9302(part), 93-9303(part).

CHAPTER 28

QUO WARRANTO

Part 1 — General Provisions

Section
27-28-101. When proceeding may be instituted for unlawful assertion of authority.
27-28-102. When proceeding may be brought against a corporation for misconduct.
27-28-103. When attorney general required to commence an action.
27-28-104. Upon whose relation action brought — security for costs.
27-28-105. Jurisdiction and venue.
27-28-106. Precedence on court calendar.

Part 2 — Procedure in General

27-28-201. Leave to file complaint.
27-28-202. Summons — complaint filed without leave.
27-28-203. Service by publication.

7-28-204. Pleadings.
7-28-205. Judgment — unlawful assertion of authority.
7-28-206. Right to appeal.
7-28-207. Procedure when action brought in supreme court.

Part 3 — Actions by Private Persons for Usurpation of Office

7-28-301. When action may be commenced — undertaking for security.
7-28-302. Contents of complaint.
7-28-303. Who may be made defendants.
7-28-304. Whose rights determined in judgment.
7-28-305. No stay of judgment of ouster pending appeal.
7-28-306. Rights of prevailing party to take office and demand books and papers.
7-28-307. Refusal to turn over books and papers punishable as contempt.
7-28-308. Subsequent action for damages for usurpation.

Part 4 — Actions to Oust Irregularly Elected Corporate Directors

7-28-401. When judgment of ouster rendered.
7-28-402. Court order to hold new election.

Part 5 — Actions Against Corporations

7-28-501. Judgment forbidding continuation of offending acts.
7-28-502. Judgment dissolving corporation.
7-28-503. Costs — judgment against corporation or alleged corporation.
7-28-504. Court appointed trustees to settle affairs of dissolved corporation.
7-28-505. Powers and duties of trustees — liability.
7-28-506. Refusal to deliver assets or papers to trustees — punishment for contempt, liability.

Part 1

General Provisions

27-28-101. When proceeding may be instituted for unlawful ssertion of authority. A civil action may be brought in the name of the ate against:

(1) a person who usurps, intrudes into, or unlawfully holds or exercises a ublic office, civil or military, or a franchise within this state or an office in corporation created by the authority of this state;

(2) a public officer, civil or military, who does or suffers an act which, by e provisions of law, works a forfeiture of his office;

(3) an association of persons who act as a corporation within this state ithout being legally incorporated.

History: En. Sec. 1410, C. Civ. Proc. 1895; re-en. Sec. 6943, Rev. C. 1907; re-en. Sec. 9576, C.M. 1921; Cal. C. Civ. Proc. Sec. 803; re-en. Sec. 9576, R.C.M. 1935; R.C.M. 1947, 93-6401.

27-28-102. When proceeding may be brought against a corpoation for misconduct. A like action may be brought against a corporation hen it has:

(1) offended against a provision of an act for its creation or renewal or ny act altering or amending such acts;

(2) forfeited its privileges and franchises by nonuser;

(3) committed or omitted an act which amounts to a surrender of its cor porate rights, privileges, and franchises;

(4) misused a franchise or privilege conferred upon it by law or exercise a franchise or privilege not so conferred.

History: En. Sec. 1411, C. Civ. Proc. 1895; re-en. Sec. 6944, Rev. C. 1907; re-en. Sec. 957 R.C.M. 1921; re-en. Sec. 9577, R.C.M. 1935; R.C.M. 1947, 93-6402.

27-28-103. When attorney general required to commence a action. The attorney general shall commence an action:

(1) when directed by the governor; and

(2) when, upon complaint or otherwise, he has good reason to believe tha any case specified in 27-28-102 can be established by proof.

History: En. Sec. 1412, C. Civ. Proc. 1895; re-en. Sec. 6945, Rev. C. 1907; re-en. Sec. 957 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 803; re-en. Sec. 9578, R.C.M. 1935; R.C.M. 1947, 93-6403.

27-28-104. Upon whose relation action brought — security fo costs. Such officer may, upon his own relation, bring any such action, or h may, on leave of the court or a judge thereof in vacation, bring the actio upon the relation of another person; and if the action be brought unde 27-28-101(1), he may require security for costs, to be given as in other cases.

History: En. Sec. 1413, C. Civ. Proc. 1895; re-en. Sec. 6946, Rev. C. 1907; re-en. Sec. 957 R.C.M. 1921; re-en. Sec. 9579, R.C.M. 1935; R.C.M. 1947, 93-6404.

27-28-105. Jurisdiction and venue. An action under this chapter ca be brought in the supreme court of the state or in the district court of th county in which the defendant or one of the defendants resides or is foun or, when the defendant is a corporation, in the county in which it is situate or has a place of business.

History: En. Sec. 1417, C. Civ. Proc. 1895; re-en. Sec. 6950, Rev. C. 1907; re-en. Sec. 958 R.C.M. 1921; re-en. Sec. 9583, R.C.M. 1935; R.C.M. 1947, 93-6408.

27-28-106. Precedence on court calendar. Actions under this chap ter in any court shall have precedence of any civil business pending therein and the court, if the matter is of public concern, shall, on the motion of th attorney general or the attorney of the party, require as speedy a trial of th merits of the case as may be consistent with the rights of the parties.

History: En. Sec. 1433, C. Civ. Proc. 1895; re-en. Sec. 6966, Rev. C. 1907; re-en. Sec. 9599 R.C.M. 1921; re-en. Sec. 9599, R.C.M. 1935; R.C.M. 1947, 93-6424.

Part 2

Procedure in General

27-28-201. Leave to file complaint. Upon application for leave t file a complaint, the court or judge may direct notice thereof to be given t the defendant previous to granting such leave and may hear the defendan in opposition thereto; and if leave be granted, an entry thereof shall be mad on the minutes of the court or the fact shall be endorsed by the judge o the complaint, which shall then be filed.

History: En. Sec. 1418, C. Civ. Proc. 1895; re-en. Sec. 6951, Rev. C. 1907; re-en. Sec. 9584 R.C.M. 1921; re-en. Sec. 9584, R.C.M. 1935; R.C.M. 1947, 93-6409.

27-28-202. Summons — complaint filed without leave. When the omplaint is filed without leave and notice, a summons shall issue and be erved as in other cases.

History: En. Sec. 1419, C. Civ. Proc. 1895; re-en. Sec. 6952, Rev. C. 1907; re-en. Sec. 9585, .C.M. 1921; re-en. Sec. 9585, R.C.M. 1935; R.C.M. 1947, 93-6410.

27-28-203. Service by publication. When a summons is returned not erved because the defendant or its officers or office cannot be found within e county, the clerk shall publish the summons as in other cases.

History: En. Sec. 1420, C. Civ. Proc. 1895; re-en. Sec. 6953, Rev. C. 1907; re-en. Sec. 9586, .C.M. 1921; re-en. Sec. 9586, R.C.M. 1935; R.C.M. 1947, 93-6411.

27-28-204. Pleadings. The pleadings shall be as in other cases.

History: En. Sec. 1421, C. Civ. Proc. 1895; re-en. Sec. 6954, Rev. C. 1907; re-en. Sec. 9587, .C.M. 1921; re-en. Sec. 9587, R.C.M. 1935; R.C.M. 1947, 93-6412.

27-28-205. Judgment — unlawful assertion of authority. When a efendant is found guilty of usurping, intruding into, or unlawfully holding r exercising an office, franchise, or privilege, judgment shall be rendered at such defendant be ousted and altogether excluded therefrom and that e relator recover his costs.

History: En. Sec. 1422, C. Civ. Proc. 1895; re-en. Sec. 6955, Rev. C. 1907; re-en. Sec. 9588, .C.M. 1921; Cal. C. Civ. Proc. Sec. 809; re-en. Sec. 9588, R.C.M. 1935; R.C.M. 1947, 93-6413.

27-28-206. Right to appeal. If the action is commenced in the district ourt, an appeal may be taken from the judgment by either party to the upreme court as in other cases.

History: En. Sec. 1435, C. Civ. Proc. 1895; re-en. Sec. 6968, Rev. C. 1907; re-en. Sec. 9601, .C.M. 1921; re-en. Sec. 9601, R.C.M. 1935; R.C.M. 1947, 93-6426(part).

27-28-207. Procedure when action brought in supreme court. ctions under this chapter commenced in the supreme court must be con-ucted in the same manner as if commenced in the district court, and the lerk of the supreme court has the same authority to issue summons and ther process and to enter orders and judgments as the clerk of the district ourt has in like cases. All pleadings and the conduct of the trial must be e same as in the district court. If a jury is required to determine an issue f fact, a jury must be drawn and selected from the jury box of Lewis and lark County and the clerk of the district court of that county shall place e jury box in the custody of the clerk of the supreme court for that pur-ose.

History: En. Sec. 1434, C. Civ. Proc. 1895; re-en. Sec. 6967, Rev. C. 1907; re-en. Sec. 9600, .C.M. 1921; re-en. Sec. 9600, R.C.M. 1935; R.C.M. 1947, 93-6425; amd. Sec. 58, Ch. 12, L. 1979.

Part 3

Actions by Private Persons for Usurpation of Office

27-28-301. When action may be commenced — undertaking for ecurity. A person claiming to be entitled to a public office unlawfully held nd exercised by another, by himself or by an attorney and counselor at law, may bring an action therefor in the name of the state, as provided in this chapter. On filing the complaint, such person shall enter into an undertaking with two sufficient sureties to be approved by the judge or any judge of the court in which the action is brought, conditioned that such person will pay any judgment for costs or damages recovered against him and all costs and expenses incurred in the prosecution of the action, which undertaking shall be filed with the clerk of the court.

History: En. Sec. 1414, C. Civ. Proc. 1895; re-en. Sec. 6947, Rev. C. 1907; re-en. Sec. 9580, R.C.M. 1921; re-en. Sec. 9580, R.C.M, 1935; R.C.M. 1947, 93-6405.

27-28-302. Contents of complaint. When the action is against a person for usurping an office, the complaint shall set forth the name of the person who claims to be entitled thereto, with an averment of his right thereto.

History: En. Sec. 1415, C. Civ. Proc. 1895; re-en. Sec. 6948, Rev. C. 1907; re-en. Sec. 9581, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 805; re-en. Sec. 9581, R.C.M. 1935; R.C.M. 1947, 93-6406(part).

27-28-303. Who may be made defendants. All persons who claim to be entitled to the same office or franchise may be made defendants in the same action to try their respective rights to such office or franchise.

History: En. Sec. 1416, C. Civ. Proc. 1895; re-en. Sec. 6949, Rev. C. 1907; re-en. Sec. 9582, R.C.M. 1921; re-en. Sec. 9582, R.C.M. 1935; R.C.M. 1947, 93-6407.

27-28-304. Whose rights determined in judgment. Judgment may be rendered upon the right of the defendant and also upon the right of the person averred to be entitled, as provided in 27-28-302, or only upon the right of the defendant, as justice requires.

History: En. Sec. 1415, C. Civ. Proc. 1895; re-en. Sec. 6948, Rev. C. 1907; re-en. Sec. 9581, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 805; re-en. Sec. 9581, R.C.M. 1935; R.C.M. 1947, 93-6406(part).

27-28-305. No stay of judgment of ouster pending appeal. If there is judgment of ouster against the defendant, there shall be no stay of execution or proceedings pending such appeal.

History: En. Sec. 1435, C. Civ. Proc. 1895; re-en. Sec. 6968, Rev. C. 1907; re-en. Sec. 9601, R.C.M. 1921; re-en. Sec. 9601, R.C.M. 1935; R.C.M. 1947, 93-6426(part).

27-28-306. Rights of prevailing party to take office and demand books and papers. If judgment be rendered in favor of the person averred to be entitled to an office, he may, after taking the oath of office and executing any official bond required by law, take upon him the execution of the office and he shall immediately thereafter demand of the defendant all the books and papers in his custody or within his power appertaining to the office from which he has been ousted.

History: En. Sec. 1425, C. Civ. Proc. 1895; re-en. Sec. 6958, Rev. C. 1907; re-en. Sec. 9591, R.C.M. 1921; re-en. Sec. 9591, R.C.M. 1935; R.C.M. 1947, 93-6416.

27-28-307. Refusal to turn over books and papers punishable as contempt. If such defendant refuse or neglect to deliver over any such book or paper pursuant to such demand, he shall be deemed guilty of a contempt of court and shall be fined in any sum not exceeding $10,000 and imprisoned in the jail of the county until he complies with the order of the court or is otherwise discharged by due course of law.

History: En. Sec. 1427, C. Civ. Proc. 1895; re-en. Sec. 6960, Rev. C. 1907; re-en. Sec. 9593, R.C.M. 1921; re-en. Sec. 9593, R.C.M. 1935; R.C.M. 1947, 93-6418.

27-28-308. Subsequent action for damages for usurpation. The rson in whose favor judgment is rendered may, at any time within 1 year ter the date of such judgment, bring an action against the party ousted and cover the damages he sustained by reason of such usurpation.

History: En. Sec. 1426, C. Civ. Proc. 1895; re-en. Sec. 6959, Rev. C. 1907; re-en. Sec. 9592, .M. 1921; re-en. Sec. 9592, R.C.M. 1935; R.C.M. 1947, 93-6417.

Part 4

Actions to Oust Irregularly Elected Corporate Directors

27-28-401. When judgment of ouster rendered. When the action is ainst a director of a corporation and the court finds that at his election her illegal votes were received or legal votes were rejected, or both, suffi-nt to change the result, judgment may be rendered that the defendant be sted and of induction in favor of the person who was entitled to be clared elected at such election.

istory: En. Sec. 1423, C. Civ. Proc. 1895; re-en. Sec. 6956, Rev. C. 1907; re-en. Sec. 9589, .M. 1921; re-en. Sec. 9589, R.C.M. 1935; R.C.M. 1947, 93-6414.

27-28-402. Court order to hold new election. In a case named in -28-401, the court may order a new election to be held, at a time and place d by judges appointed by the court, notice of which election and naming judges shall be given for the time and in the manner provided by law notice of elections of directors of such corporation. The order of the court all become obligatory upon the corporation and its officers when a duly tified copy thereof is served upon its secretary personally or left at its ncipal office, and the court may enforce its order by attachment or in any er manner it deems necessary.

istory: En. Sec. 1424, C. Civ. Proc. 1895; re-en. Sec. 6957, Rev. C. 1907; re-en. Sec. 9590, .M. 1921; re-en. Sec. 9590, R.C.M. 1935; R.C.M. 1947, 93-6415.

Part 5

Actions Against Corporations

27-28-501. Judgment forbidding continuation of offending acts. en it is found and adjudged that a corporation has offended in any matter manner which does not work such surrender or forfeiture, misused a fran-se, or exercised a power not conferred by law, judgment shall be entered t it be ousted from the continuance of such offense or the exercise of such ver.

istory: En. Sec. 1428, C. Civ. Proc. 1895; re-en. Sec. 6961, Rev. C. 1907; re-en. Sec. 9594, .M. 1921; re-en. Sec. 9594, R.C.M. 1935; R.C.M. 1947, 93-6419(part).

27-28-502. Judgment dissolving corporation. When in any such ion it is found and adjudged that a corporation has, by an act done or itted, surrendered or forfeited its corporate rights, privileges, or franchises or has not used the same during a term of 5 years, judgment shall be enter that it be ousted and excluded therefrom and that it be dissolved.

History: En. Sec. 1428, C. Civ. Proc. 1895; re-en. Sec. 6961, Rev. C. 1907; re-en. Sec. 95 R.C.M. 1921; re-en. Sec. 9594, R.C.M. 1935; R.C.M. 1947, 93-6419(part).

27-28-503. Costs — judgment against corporation or allege corporation. If judgment be rendered against a corporation or against person claiming to be a corporation, the court may render judgment for cos against the directors or other officers of the corporation or against the pers claiming to be a corporation.

History: En. Sec. 1432, C. Civ. Proc. 1895; re-en. Sec. 6965, Rev. C. 1907; re-en. Sec. 95 R.C.M. 1921; re-en. Sec. 9598, R.C.M. 1935; R.C.M. 1947, 93-6423.

27-28-504. Court appointed trustees to settle affairs of di solved corporation. The court rendering a judgment dissolving a corpor tion shall appoint trustees of the creditors and stockholders of th corporation, who, after giving an undertaking payable to the state, in su sum and with such sureties as the court may designate and approve, cond tioned that they will faithfully discharge their trust and properly pay ar apply all money that may come into their hands, shall have power to sett the affairs of the corporation, collect and pay outstanding debts, and divi among the stockholders the money and other property which remain aft the payment of debts and necessary expenses.

History: En. Sec. 1429, C. Civ. Proc. 1895; re-en. Sec. 6962, Rev. C. 1907; re-en. Sec. 95 R.C.M. 1921; re-en. Sec. 9595, R.C.M. 1935; R.C.M. 1947, 93-6420.

27-28-505. Powers and duties of trustees — liability. (1) Th trustees shall immediately demand all money, property, and papers withi the custody or control of the officers of the corporation belonging to the co poration or in any way necessary for the settlement of its affairs or for th discharge of its debts and liabilities; and they may sue for and recover th demands and property of the corporation.

(2) The trustees are jointly and severally liable to the creditors and stock holders of the corporation to the extent of its property and effects whic come into their hands.

History: En. Sec. 1430, C. Civ. Proc. 1895; re-en. Sec. 6963, Rev. C. 1907; re-en. Sec. 959 R.C.M. 1921; re-en. Sec. 9596, R.C.M. 1935; R.C.M. 1947, 93-6421; amd. Sec. 59, Ch. 12, L. 1979.

27-28-506. Refusal to deliver assets or papers to trustees - punishment for contempt, liability. An officer of such corporation wh refuses or neglects to deliver over any such money or other things pursuar to such demand shall be deemed guilty of a contempt of court and shall b fined not exceeding $10,000 and imprisoned in the jail of the proper count until he complies with the order of the court or is otherwise discharged b due course of law, and he shall be liable to the trustees for the value of a money or other things so refused or neglected to be surrendered, togethe with all damages that have been sustained by the stockholders and credito of the corporation, or any of them, in consequence of such neglect or refusal.

History: En. Sec. 1431, C. Civ. Proc. 1895; re-en. Sec. 6964, Rev. C. 1907; re-en. Sec. 959 R.C.M. 1921; re-en. Sec. 9597, R.C.M. 1935; R.C.M. 1947, 93-6422.

CHAPTER 29

RESERVED

CHAPTER 30

NUISANCES

Part 1 — General Provisions

ection

7-30-101. Definition of nuisance.
7-30-102. Distinction between public and private nuisances.
7-30-103. Action for nuisance.
7-30-104. Right to recover damages unaffected by abatement.
7-30-105. Successive owners liable for nuisance.

Part 2 — Public Nuisances

7-30-201. Public nuisance not legalized by time.
7-30-202. Remedies for public nuisances.
7-30-203. When private person may maintain action for public nuisance.
7-30-204. Abatement of public nuisance by public body or officer or injured party.

Part 3 — Private Nuisances

7-30-301. Remedies for private nuisances.
7-30-302. Abatement of private nuisance by injured party.

Part 1

General Provisions

27-30-101. Definition of nuisance. (1) Anything which is injurious to ealth, indecent or offensive to the senses, or an obstruction to the free use f property, so as to interfere with the comfortable enjoyment of life or property, or which unlawfully obstructs the free passage or use, in the customary anner, of any navigable lake, river, bay, stream, canal, or basin or any ublic park, square, street, or highway is a nuisance.

(2) Nothing which is done or maintained under the express authority of statute can be deemed a nuisance.

History: (1)En. Sec. 4550, Civ. C. 1895; re-en. Sec. 6162, Rev. C. 1907; re-en. Sec. 8642, R.C.M. 21; Cal. Civ. C. Sec. 3479; re-en. Sec. 8642, R.C.M 1935; Sec. 57-101, R.C.M. 1947; (2)En. Sec. 553, Civ. C. 1895; re-en. Sec. 6165, Rev. C. 1907; re-en. Sec. 8645, R.C.M. 1921; Cal. Civ. C. Sec. 482; Field Civ. C. Sec. 1952; re-en. Sec. 8645, R.C.M. 1935; Sec. 57-104, R.C.M. 1947; R.C.M. 1947, 7-101, 57-104.

27-30-102. Distinction between public and private nuisances. l) A public nuisance is one which affects, at the same time, an entire comunity or neighborhood or any considerable number of persons, although the xtent of the annoyance or damage inflicted upon individuals may be nequal.

(2) Every nuisance not included in the definition of subsection (1) is pr vate.

History: (1)En. Sec. 4551, Civ. C. 1895; re-en. Sec. 6163, Rev. C. 1907; re-en. Sec. 8643, R.C.M 1921; Cal. Civ. C. Sec. 3480; Based on Field Civ. C. Sec. 1950; re-en. Sec. 8643, R.C.M. 1935; Se 57-102, R.C.M. 1947; (2)En. Sec. 4552, Civ. C. 1895; re-en. Sec. 6164, Rev. C. 1907; re-en. Sec. 864 R.C.M. 1921; Cal. Civ. C. Sec. 3481; Field Civ. C. Sec. 1951; re-en. Sec. 8644, R.C.M. 1935; Se 57-103, R.C.M. 1947; R.C.M. 1947, 57-102, 57-103.

27-30-103. Action for nuisance. A nuisance is the subject of a action. Such action may be brought by any person whose property is injur ously affected or whose personal enjoyment is lessened by the nuisance, an by the judgment the nuisance may be enjoined or abated, as well as damage recovered.

History: En. Sec. 228, p. 91, Bannack Stat.; amd. Sec. 249, p. 187, L. 1867; re-en. Sec. 298, 93, Cod. Stat. 1871; re-en. Sec. 349, p. 137, L. 1877; re-en. Sec. 349, 1st Div. Rev. Stat. 1879; re-e Sec. 361, 1st Div. Comp. Stat. 1887; re-en. Sec. 1300, C. Civ. Proc. 1895; re-en Sec. 6865, Rev. 1907; re-en. Sec. 9474, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 731; re-en. Sec. 9474, R.C.M. 193 R.C.M. 1947, 93-6101(part).

27-30-104. Right to recover damages unaffected by abatemen The abatement of a nuisance does not prejudice the right of any person t recover damages for its past existence.

History: En. Sec. 4555, Civ. C. 1895; re-en. Sec. 6167, Rev. C. 1907; re-en. Sec. 8647, R.C.M 1921; Cal. Civ. C. Sec. 3484; Field Civ. C. Sec. 1954; re-en. Sec. 8647, R.C.M. 1935; R.C.M. 194 57-106.

27-30-105. Successive owners liable for nuisance. Every succes sive owner of property who neglects to abate a continuing nuisance upon o in the use of such property, created by a former owner, is liable therefor i the same manner as the one who first created it.

History: En. Sec. 4554, Civ. C. 1895; re-en. Sec. 6166, Rev. C. 1907; re-en. Sec. 8646, R.C.M 1921; Cal. Civ. C. Sec. 3483; Field Civ. C. Sec. 1953; re-en. Sec. 8646, R.C.M. 1935; R.C.M. 194 57-105.

Part 2

Public Nuisances

27-30-201. Public nuisance not legalized by time. No lapse o time can legalize a public nuisance amounting to an actual obstruction o public right.

History: En. Sec. 4570, Civ. C. 1895; re-en. Sec. 6168, Rev. C. 1907; re-en. Sec. 8648, R.C.M 1921; Cal. Civ. C. Sec. 3490; Field Civ. C. Sec. 1955; re-en. Sec. 8648, R.C.M. 1935; R.C.M. 194 57-107.

27-30-202. Remedies for public nuisances. (1) The remedie against a public nuisance are:

(a) indictment or information;

(b) a civil action; or

(c) abatement.

(2) The remedy by indictment or information is regulated by Titles 4 and 46.

History: (1)En. Sec. 4571, Civ. C. 1895; re-en. Sec. 6169, Rev. C. 1907; re-en. Sec. 8649, R.C.M 1921; Cal. Civ. C. Sec. 3491; Based on Field Civ. C. Sec. 1956; re-en. Sec. 8649, R.C.M. 1935; Se

7-108, R.C.M. 1947; (2)En. Sec. 4572, Civ. C. 1895; re-en. Sec. 6170, Rev. C. 1907; re-en. Sec. 8650, .C.M. 1921; Cal. Civ. C. Sec. 3492; re-en. Sec. 8650, R.C.M. 1935; Sec. 57-109, R.C.M. 1947; .C.M. 1947, 57-108, 57-109.

27-30-203. When private person may maintain action for public uisance. A private person may maintain an action for a public nuisance if is specially injurious to himself, but not otherwise.

History: En. Sec. 4573, Civ. C. 1895; re-en. Sec. 6171, Rev. C. 1907; re-en. Sec. 8651, R.C.M. 21; Cal. Civ. C. Sec. 3493; Field Civ. C. Sec. 1958; re-en. Sec. 8651, R.C.M. 1935; R.C.M. 1947, 7-110.

27-30-204. Abatement of public nuisance by public body or fficer or injured party. A public nuisance may be abated by any public ody or officer authorized thereto by law. Any person may abate a public uisance which is specially injurious to him by removing or, if necessary, estroying the thing that constitutes the same without committing a breach f the peace or doing unnecessary injury.

History: Ap. p. Sec. 4574, Civ. C. 1895; re-en. Sec. 6172, Rev. C. 1907; re-en. Sec. 8652, R.C.M. 21; Cal. Civ. C. Sec. 3494; Field Civ. C. Sec. 1959; re-en. Sec. 8652, R.C.M. 1935; Sec. 57-111, .C.M. 1947; Ap. p. Sec. 4575, Civ. C. 1895; re-en. Sec. 6173, Rev. C. 1907; re-en. Sec. 8653, R.C.M. 21; Cal. Civ. C. Sec. 3495; Field Civ. C. Sec. 1960; re-en. Sec. 8653, R.C.M. 1935; Sec. 57-112, .C.M. 1947; R.C.M. 1947, 57-111, 57-112.

Part 3

Private Nuisances

27-30-301. Remedies for private nuisances. The remedies against private nuisance are:

(1) a civil action; or

(2) abatement.

History: En. Sec. 4590, Civ. C. 1895; re-en. Sec. 6174, Rev. C. 1907; re-en. Sec. 8654, R.C.M. 21; Cal. Civ. C. Sec. 3501; Field Civ. C. Sec. 1961; re-en. Sec. 8654, R.C.M. 1935; R.C.M. 1947, 7-113.

27-30-302. Abatement of private nuisance by injured party. A erson injured by a private nuisance may abate it by removing or, if necesary, destroying the thing which constitutes the nuisance without committing breach of the peace or doing unnecessary injury. Where a private nuisance esults from a mere omission of the wrongdoer and cannot be abated without ntering upon his land, reasonable notice must be given to him before enterng to abate it.

History: Ap. p. Sec. 4591, Civ. C. 1895; re-en. Sec. 6175, Rev. C. 1907; re-en. Sec. 8655, R.C.M. 21; Cal. Civ. C. Sec. 3502; Field Civ. C. Sec. 1962; re-en. Sec. 8655, R.C.M. 1935; Sec. 57-114, .C.M. 1947; Ap. p. Sec. 4592, Civ. C. 1895; re-en. Sec. 6176, Rev. C. 1907; re-en. Sec. 8656, R.C.M. 21; Cal. Civ. C. Sec. 3503; Field Civ. C. Sec. 1963; re-en. Sec. 8656, R.C.M. 1935; Sec. 57-115, .C.M. 1947; R.C.M. 1947, 57-114, 57-115.

CHAPTER 31

CHANGE OF NAME

Part 1 — General Provisions

ection
-31-101. Petition for change of name of natural person.
-31-102. Petition for change of name of nonprofit corporation.

27-31-103. District court jurisdiction.

Part 2 — Procedure

27-31-201. Order setting hearing date — notice.
27-31-202. Filing of objections to change.
27-31-203. Conduct of hearing.
27-31-204. Court order.
27-31-205. Annual report of name changes by clerk to legislative council — publication.

Part 1

General Provisions

27-31-101. Petition for change of name of natural person. Al applications for change of names must be made to the district court of th county where the person whose name is proposed to be changed resides, b petition signed by such person and, if such person is under 18 years of age by one of the parents, if living, or if both be dead, then by the guardian, an if there be no guardian, then by some near relative or friend. The petitio must specify the place of birth and residence of such person, his or he present name, the name proposed, and the reason for such change of nam and must, if neither parent of such person be living, name as far as know to the petitioner the near relatives of such person and their place of residence.

History: En. Sec. 2261, C. Civ. Proc. 1895; re-en. Sec. 7361, Rev. C. 1907; amd. Sec. 1, Ch. 39 L. 1921; re-en. Sec. 9964, R.C.M. 1921; re-en. Sec. 9964, R.C.M. 1935; amd. Sec. 21, Ch. 240, L 1971; amd. Sec. 33, Ch. 94, L. 1973; amd. Sec. 59, Ch. 535, L. 1975; R.C.M. 1947, 93-100-2(part).

27-31-102. Petition for change of name of nonprofit corporation. Any religious, benevolent, literary, or scientific corporation or any corporation bearing or using or being known by the name of any benevolent o charitable order or society may by petition apply to the district court of th county in which its articles of incorporation were originally filed or in which its property is situated for a change of its corporate name. Such petitio must be signed by a majority of the directors or trustees of the corporatio and must specify the date of the formation of the corporation, the name proposed, and the reason for the change of name. Upon the filing of the petition the same procedure shall be followed as upon applications for changes o names of natural persons.

History: En. Sec. 2261, C. Civ. Proc. 1895; re-en. Sec. 7361, Rev. C. 1907; amd. Sec. 1, Ch. 39 L. 1921; re-en. Sec. 9964, R.C.M. 1921; re-en. Sec. 9964, R.C.M. 1935; amd. Sec. 21, Ch. 240, L 1971; amd. Sec. 33, Ch. 94, L. 1973; amd. Sec. 59, Ch. 535, L. 1975; R.C.M. 1947, 93-100-2(part) amd. Sec. 60, Ch. 12, L. 1979.

27-31-103. District court jurisdiction. Applications for change o names must be heard and determined by the district court.

History: En. Sec. 2260, C. Civ. Proc. 1895; re-en. Sec. 7360, Rev. C. 1907; re-en. Sec. 9963 R.C.M. 1921; re-en. Sec. 9963, R.C.M. 1935; R.C.M. 1947, 93-100-1.

Part 2

Procedure

27-31-201. Order setting hearing date — notice. When a petition setting out the matters contained in 27-31-101 or 27-31-102 is filed, the court or judge may appoint a time for hearing the petition. Notice of the time and place of hearing the petition must be published for 4 successive weeks in some newspaper published in the county, if a newspaper be printed therein, but if no newspaper be printed in the county, a copy of such notice must be posted in at least three public places in the county for a like period.

History: En. Sec. 2262, C. Civ. Proc. 1895; re-en. Sec. 7362, Rev. C. 1907; amd. Sec. 1, Ch. 7, L. 1911; re-en. Sec. 9965, R.C.M. 1921; re-en. Sec. 9965, R.C.M. 1935; R.C.M. 1947, 93-100-3.

27-31-202. Filing of objections to change. At any time before such hearing, objections may be filed by any person who can, in such objections, show to the court or judge good reasons against such change of name.

History: En. Sec. 2263, C. Civ. Proc. 1895; re-en. Sec. 7363, Rev. C. 1907; amd. Sec. 2, Ch. 7, L. 1911; re-en. Sec. 9966, R.C.M. 1921; re-en. Sec. 9966, R.C.M. 1935; R.C.M. 1947, 93-100-4(part).

27-31-203. Conduct of hearing. On the day set for the hearing of said petition or at any time to which the hearing is continued or postponed, due proof of the publication or posting of the required notice as set out in 7-31-201 being made, such application must be heard. On the hearing the court or judge may examine on oath any of the petitioners, remonstrants, or other persons touching the application.

History: En. Sec. 2263, C. Civ. Proc. 1895; re-en. Sec. 7363, Rev. C. 1907; amd. Sec. 2, Ch. 7, L. 1911; re-en. Sec. 9966, R.C.M. 1921; re-en. Sec. 9966, R.C.M. 1935; R.C.M. 1947, 93-100-4(part).

27-31-204. Court order. The court or judge may make an order changing the name or dismissing the applications, as to the court or judge may seem right and proper.

History: En. Sec. 2263, C. Civ. Proc. 1895; re-en. Sec. 7363, Rev. C. 1907; amd. Sec. 2, Ch. 7, L. 1911; re-en. Sec. 9966, R.C.M. 1921; re-en. Sec. 9966, R.C.M. 1935; R.C.M. 1947, 93-100-4(part).

27-31-205. Annual report of name changes by clerk to legislative council — publication. Each January the clerk of the district court shall report to the legislative council all changes of names made during the preceding year in the district court of his county under this chapter. The report must show the date of the judgment, original name, name decreed, and residence. The reports must be published in tabular form with the statutes first published thereafter.

History: En. Sec. 2264, C. Civ. Proc. 1895; re-en. Sec. 7364, Rev. C. 1907; re-en. Sec. 9967, R.C.M. 1921; re-en. Sec. 9967, R.C.M. 1935; R.C.M. 1947, 93-100-5; amd. Sec. 61, Ch. 12, L. 1979.

CHAPTER 32

JUDICIAL DETERMINATION OF BIRTH DATE

Part 1 — General Provisions
Petition for Determination

Section
7-32-101. Who may petition — where petition filed.

27-32-102. Contents of petition.
27-32-103. Exclusive jurisdiction of district courts.
27-32-104. Fees.

Part 2 — Preliminary Procedure—Hearing

27-32-201. Order setting hearing date — notice.
27-32-202. Objections to granting of petition.
27-32-203. Conduct of hearing.
27-32-204. Transfer of proceeding to proper county.

Part 3 — Judgment—Appeal

27-32-301. Judgment.
27-32-302. Clerk to certify and file judgment.
27-32-303. Appeal.

Part 1

General Provisions
Petition for Determination

27-32-101. Who may petition — where petition filed. For the purpose of having a judicial determination of the date of birth, any citizen of the United States, either natural born or naturalized, may file with the clerk of the district court of the county of his residence a petition.

History: **En. Sec. 1, Ch. 16, L. 1943; R.C.M. 1947, 93-101-1(part).**

27-32-102. Contents of petition. The petition must be duly verified by the petitioner and must contain the following:

(1) The petition must state:

(a) that the petitioner is a citizen of the United States;

(b) that he has resided in the state of Montana for 1 year last past and in the county in which the action is brought for at least 90 days immediately preceding the commencement of the action;

(c) the place of his birth;

(d) the names of his parents, together with the place of the birth of each of his parents and their address, if they are living;

(e) the name and address of each of his brothers and sisters;

(f) if the address of either of the parents or of any of the brothers or sisters is not known, then their last known place of address.

(2) If the petitioner was born outside of the United States, then the petition must state:

(a) whether his parents came to the United States and, if so, where they came and where they resided or reside;

(b) whether they or either of them were naturalized within the United States and, if so, when and where such naturalization took place.

History: **En. Sec. 1, Ch. 16, L. 1943; R.C.M. 1947, 93-101-1(part).**

27-32-103. Exclusive jurisdiction of district courts. The district courts of this state shall have exclusive jurisdiction to hear and determine all petitions hereunder.

History: **En. Sec. 6, Ch. 16, L. 1943; R.C.M. 1947, 93-101-6(part).**

27-32-104. Fees. The petitioner, upon the filing of the petition, must ay to the clerk of court a fee of $1, and upon the entry of judgment the pplicant must pay to the clerk of court an additional fee of $1. No charge hall be made for posting of the notices required hereunder. If the applicant hall provide a true copy of the judgment rendered, then the clerk of court ust certify the same without additional charge.

History: En. Sec. 4, Ch. 16, L. 1943; amd. Sec. 105, Ch. 349, L. 1974; R.C.M. 1947, 3-101-4(part).

Part 2

Preliminary Procedure — Hearing

27-32-201. Order setting hearing date — notice. Upon the filing f this petition with the clerk of the district court, an order shall be made y the court or judge thereof fixing the date of the hearing of the petition nd directing that notice of such hearing be given as in such order set forth. otice shall be given by posting in three public places within the county for period of not less than 10 or more than 30 days, as the court, in its discre- on, shall determine.

History: En. Sec. 2, Ch. 16, L. 1943; R.C.M. 1947, 93-101-2(part).

27-32-202. Objections to granting of petition. Any citizen of the nited States may appear and object to the granting of such petition, but l such objections shall be made in writing.

History: En. Sec. 2, Ch. 16, L. 1943; R.C.M. 1947, 93-101-2(part).

27-32-203. Conduct of hearing. At the time fixed for the hearing of ch petition, the petitioner must appear and testify. Upon the hearing ereof, affidavits shall be received in evidence and shall have the same force d effect as if the testimony had been taken by deposition.

History: En. Sec. 3, Ch. 16, L. 1943; R.C.M. 1947, 93-101-3(part).

27-32-204. Transfer of proceeding to proper county. If upon the aring of the petition it shall appear that the petitioner is entitled to have dgment entered as herein provided but that the petition has been filed in e wrong county, then the court shall, by appropriate order, direct that the oceeding be transferred to the proper county.

History: En. Sec. 5, Ch. 16, L. 1943; R.C.M. 1947, 93-101-5.

Part 3

Judgment — Appeal

27-32-301. Judgment. If the court shall be satisfied by competent evi- nce of the sufficiency of the petition that the applicant is a citizen of the nited States, that he has been a citizen of the state of Montana for 1 year st past and of the county for more than 90 days preceding the filing of the tition, and that the applicant's date of birth is proven, then the court shall render judgment accordingly and that judgment shall constitute conclusive evidence of the date of the birth of the applicant.

History: En. Sec. 3, Ch. 16, L. 1943; R.C.M. 1947, 93-101-3(part).

27-32-302. Clerk to certify and file judgment. The clerk of the court shall certify to two copies of such judgment and file one with the department of health and environmental sciences, Helena, and the other with the county clerk and recorder of the county in which the judgment was obtained.

History: En. Sec. 4, Ch. 16, L. 1943; amd. Sec. 105, Ch. 349, L. 1974; R.C.M. 1947, 93-101-4(part).

27-32-303. Appeal. Any citizen may appeal from the judgment rendered the same as in civil actions.

History: En. Sec. 6, Ch. 16, L. 1943; R.C.M. 1947, 93-101-6(part).

TITLE 28

CONTRACTS AND OTHER OBLIGATIONS

h.
. Obligations in General.
2. Contracts.
3. Interpretation of Contracts.
Chapters 4 through 9 reserved.
0. Agency.
. Guaranty, Indemnity, and Suretyship.

CHAPTER 1

OBLIGATIONS IN GENERAL

Part 1 — General Provisions

ction
-1-101. Definitions.
-1-102. How obligations arise.
-1-103. What rules govern interpretation of contracts and other obligations.
-1-104. Relief from forfeiture.

Part 2 — Obligations Imposed by Law

-1-201. General duty of care.
-1-202. Obligation of one who unilaterally decides to render service.
-1-203. Enforcement of obligations arising by operation of law.

Part 3 — Joint Obligations

-1-301. Types of obligations involving several persons.
-1-302. Joint obligations and convenants to be taken as joint and several.
-1-303. Right to contribution from joint debtors.

Part 4 — Conditional Obligations

-1-401. What obligations are conditional.
-1-402. Types of conditions.
-1-403. Condition precedent defined.
-1-404. Condition concurrent defined.
-1-405. Condition subsequent defined.
-1-406. What conditions must be performed before requiring performance by another.
-1-407. When prior performance of conditions excused.
-1-408. Condition involving forfeiture to be strictly construed.

Part 5 — Alternative Obligations

-1-501. Who may select between alternative performances.
-1-502. How right of selection lost.
-1-503. One alternative to be selected in its entirety.
-1-504. When obligation to be interpreted as though a particular alternative did not exist.

Parts 6 through 9 reserved

Part 10 — Transfer of Rights and Duties Under Obligation

-1-1001. Rights arising out of obligation transferable.

28-1-1002. When burden of obligation may be transferred.

Part 11 — Extinction of Obligation by Performance

28-1-1101. Extinction of obligation by full performance.
28-1-1102. Performance by one of several joint debtors.
28-1-1103. Performance to one of several joint creditors.
28-1-1104. Extinction when directions of creditor followed.
28-1-1105. When partial performance extinguishes part of obligation.
28-1-1106. Application of performance when there are several obligations.
Sections 28-1-1107 through 28-1-1110 reserved.
28-1-1111. Receipt for money, instrument, or property delivered.
28-1-1112. Objections to tender — waiver.
28-1-1113. Creditor's retention of thing which he refuses to accept.

Part 12 — Extinction of Obligation by Offer of Performance

28-1-1201. When obligation extinguished by offer of performance.
28-1-1202. Effect of offer.
28-1-1203. Offer of partial performance ineffective.
28-1-1204. Who must make offer of performance.
28-1-1205. To whom offer must be made.
28-1-1206. Where offer may be made.
28-1-1207. When offer must be made.
28-1-1208. Offer of late performance with compensation.
28-1-1209. Offer to be made in good faith.
28-1-1210. Offeror to be able and willing to perform.
28-1-1211. When offer may be conditional.
28-1-1212. Objections to mode of offer — waiver.
Sections 28-1-1213 through 28-1-1220 reserved.
28-1-1221. Title to thing offered.
28-1-1222. Production of thing to be delivered.
28-1-1223. Thing offered to be kept separate.
28-1-1224. Custody of thing other than money.
28-1-1225. Deposit of money offered in payment.

Part 13 — Prevention of Performance

28-1-1301. When delay or failure to perform or offer to perform excused.
28-1-1302. Effect when performance prevented by creditor.
28-1-1303. Effect when performance prevented by other causes.
28-1-1304. Effect of refusal to accept performance before offer.

Part 14 — Accord and Satisfaction

28-1-1401. Accord — definition and effect.
28-1-1402. Satisfaction — definition and effect.
28-1-1403. When part performance extinguishes obligation.

Part 15 — Novation

28-1-1501. Novation defined.
28-1-1502. Kinds of novation.
28-1-1503. How novation accomplished.
28-1-1504. When acceptance of novation may be rescinded.

Part 16 — Release of Debtor by Creditor

28-1-1601. Extinction of obligation by a release.
28-1-1602. What claims survive general release.
28-1-1603. Effect of release of some but not all joint debtors.

Part 1

General Provisions

28-1-101. Definitions. (1) An obligation is a legal duty by which a erson is bound to do or not to do a certain thing.

(2) Performance of an obligation for the delivery of money only is called ayment.

History: En. Secs. 1920, 2005, Civ. C. 1895; re-en. Secs. 4892, 4927, Rev. C. 1907; re-en. Secs. 394, 7429, R.C.M. 1921; Cal. Civ. C. Secs. 1427, 1478; Field Civ. C. Secs. 670, 704; re-en. Secs. 394, 7429, R.C.M. 1935; R.C.M. 1947, 58-101, 58-406.

28-1-102. How obligations arise. An obligation arises either from:

(1) the contract of the parties; or

(2) the operation of law.

History: En. Sec. 1921, Civ. C. 1895; re-en. Sec. 4893, Rev. C. 1907; re-en. Sec. 7395, R.C.M. 21; Cal. Civ. C. Sec. 1428; Based on Field Civ. C. Sec. 671; re-en. Sec. 7395, R.C.M. 1935; R.C.M. 47, 58-102(part).

28-1-103. What rules govern interpretation of contracts and ther obligations. The rules which govern the interpretation of contracts re prescribed by this title and Title 1. Other obligations are interpreted by e same rules by which statutes of a similar nature are interpreted.

History: En. Sec. 1930, Civ. C. 1895; re-en. Sec. 4894, Rev. C. 1907; re-en. Sec. 7396, R.C.M. 21; Cal. Civ. C. Sec. 1429; Field Civ. C. Sec. 672; re-en. Sec. 7396, R.C.M. 1935; R.C.M. 1947, -103; amd. Sec. 1, Ch. 117, L. 1979.

28-1-104. Relief from forfeiture. Whenever by the terms of an obli- ation a party thereto incurs a forfeiture or a loss in the nature of a forfei- re by reason of his failure to comply with its provisions, he may be relieved erefrom upon making full compensation to the other party, except in case a grossly negligent, willful, or fraudulent breach of duty.

History: En. Sec. 4261, Civ. C. 1895; re-en. Sec. 6039, Rev. C. 1907; re-en. Sec. 8658, R.C.M. 21; Cal. Civ. C. Sec. 3275; re-en. Sec. 8658, R.C.M. 1935; R.C.M. 1947, 17-102.

Part 2

Obligations Imposed by Law

28-1-201. General duty of care. Every person is bound, without con- act, to abstain from injuring the person or property of another or infringing on any of his rights.

History: En. Sec. 2290, Civ. C. 1895; re-en. Sec. 5071, Rev. C. 1907; re-en. Sec. 7573, R.C.M. 21; Cal. Civ. C. Sec. 1708; Field Civ. C. Sec. 847; re-en. Sec. 7573, R.C.M. 1935; R.C.M. 1947, -601.

28-1-202. Obligation of one who unilaterally decides to render ervice. One who officiously and without the consent of the real or apparent vner of a thing takes it into his possession for the purpose of rendering ser- ce about it must complete such service and use ordinary care, diligence, and asonable skill about the same. He is not entitled to any compensation for s service or expenses, except that he may deduct actual and necessary expenses incurred by him about such service from any profits which his service has caused the thing to acquire for its owner and must account to th owner for the residue.

History: En. Sec. 2760, Civ. C. 1895; re-en. Sec. 5295, Rev. C. 1907; re-en. Sec. 7810, R.C.M 1921; Cal. Civ. C. Sec. 2078; Field Civ. C. Sec. 1083; re-en. Sec. 7810, R.C.M. 1935; R.C.M. 1947 41-501.

28-1-203. Enforcement of obligations arising by operation o law. An obligation arising from operation of law may be enforced by civi action or proceeding or in the manner provided by law.

History: En. Sec. 1921, Civ. C. 1895; re-en. Sec. 4893, Rev. C. 1907; re-en. Sec. 7395, R.C.M 1921; Cal. Civ. C. Sec. 1428; Based on Field Civ. C. Sec. 671; re-en. Sec. 7395, R.C.M. 1935; R.C.M 1947, 58-102(part).

Part 3

Joint Obligations

28-1-301. Types of obligations involving several persons. A obligation imposed upon several persons or a right created in favor of several persons may be:

(1) joint;
(2) several; or
(3) joint and several.

History: En. Sec. 1940, Civ. C. 1895; re-en. Sec. 4895, Rev. C. 1907; re-en. Sec. 7397, R.C.M. 1921; Cal. Civ. C. Sec. 1430; Field Civ. C. Sec. 673; re-en. Sec. 7397, R.C.M. 1935; R.C.M. 1947, 58-201.

28-1-302. Joint obligations and covenants to be taken as joint and several. After March 1, 1895, all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants.

History: En. Sec. 1941, Civ. C. 1895; re-en. Sec. 4896, Rev. C. 1907; re-en. Sec. 4896, Rev. C. 1907; re-en. Sec. 7398, R.C.M. 1921; Cal. Civ. C. Sec. 1431; re-en. Sec. 7398, R.C.M. 1935; R.C.M. 1947, 58-202.

28-1-303. Right to contribution from joint debtors. A party to a joint or joint and several obligation who satisfies more than his share of the claim against all may require a proportionate contribution from all the parties joined with him.

History: En. Sec. 1942, Civ. C. 1895; re-en. Sec. 4897; Rev. C. 1907; re-en. Sec. 7399, R.C.M. 1921; Cal. Civ. C. Sec. 1432; Field Civ. C. Sec. 675; re-en. Sec. 7399, R.C.M. 1935; R.C.M. 1947, 58-203.

Part 4

Conditional Obligations

28-1-401. What obligations are conditional. An obligation is conditional when the rights or duties of any party thereto depend upon the occurrence of an uncertain event.

History: En. Sec. 1950, Civ. C. 1895; re-en. Sec. 4898, Rev. C. 1907; re-en. Sec. 7400, R.C.M. 1921; Cal. Civ. C. Sec. 1434; Field Civ. C. Sec. 676; re-en. Sec. 7400, R.C.M. 1935; R.C.M. 1947, 58-204.

28-1-402. Types of conditions. Conditions may be precedent, concur-nt, or subsequent.

History: En. Sec. 1951, Civ. C. 1895; re-en. Sec. 4899, Rev. C. 1907; re-en. Sec. 7401, R.C.M. 21; Cal. Civ. C. Sec. 1435; Field Civ. C. Sec. 677; re-en. Sec. 7401, R.C.M. 1935; R.C.M. 1947, -205.

28-1-403. Condition precedent defined. A condition precedent is ne which is to be performed before some right dependent thereon accrues some act dependent thereon is performed.

History: En. Sec. 1952, Civ. C. 1895; re-en. Sec. 4900, Rev. C. 1907; re-en. Sec. 7402, R.C.M. 21; Cal. Civ. C. Sec. 1436; Field Civ. C. Sec. 678; re-en. Sec. 7402, R.C.M. 1935; R.C.M. 1947, -206.

28-1-404. Condition concurrent defined. Conditions concurrent are ose which are mutually dependent and are to be performed at the same me.

History: En. Sec. 1953, Civ. C. 1895; re-en. Sec. 4901, Rev. C. 1907; re-en. Sec. 7403, R.C.M. 21; Cal. Civ. C. Sec. 1437; Field Civ. C. Sec. 679; re-en. Sec. 7403, R.C.M. 1935; R.C.M. 1947, -207.

28-1-405. Condition subsequent defined. A condition subsequent is ne referring to a future event upon the happening of which the obligation ecomes no longer binding upon the other party if he chooses to avail himself the condition.

History: En. Sec. 1954, Civ. C. 1895; re-en. Sec. 4902, Rev. C. 1907; re-en. Sec. 7404, R.C.M. 21; Cal. Civ. C. Sec. 1438; Field Civ. C. Sec. 680; re-en. Sec. 7404, R.C.M. 1935; R.C.M. 1947, -208.

28-1-406. What conditions must be performed before requiring erformance by another. Before any party to an obligation can require nother party to perform any act under it, he must fulfill all conditions ecedent thereto imposed upon himself and must be able and offer to fulfill l conditions concurrent so imposed upon him on the like fulfillment by the her party, except as provided by 28-1-407.

History: En. Sec. 1955, Civ. C. 1895; re-en. Sec. 4903, Rev. C. 1907; re-en. Sec. 7405, R.C.M. 21; Cal. Civ. C. Sec. 1439; Field Civ. C. Sec. 681; re-en. Sec. 7405, R.C.M. 1935; R.C.M. 1947, -209.

28-1-407. When prior performance of conditions excused. If a rty to an obligation gives notice to another, before the latter is in default, at he will not perform the same upon his part and does not retract such otice before the time at which performance upon his part is due, such other rty is entitled to enforce the obligation without previously performing or fering to perform any conditions upon his part in favor of the former.

History: En. Sec. 1956, Civ. C. 1895; re-en. Sec. 4904, Rev. C. 1907; re-en. Sec. 7406, R.C.M. 21; Cal. Civ. C. Sec. 1440; Field Civ. C. Sec. 682; re-en. Sec. 7406, R.C.M. 1935; R.C.M. 1947, -210.

28-1-408. Condition involving forfeiture to be strictly con-rued. A condition involving a forfeiture must be strictly interpreted ainst the party for whose benefit it is created.

History: En. Sec. 1958, Civ. C. 1895; re-en. Sec. 4906, Rev. C. 1907; re-en. Sec. 7408, R.C.M. 21; Cal. Civ. C. Sec. 1442; Field Civ. C. Sec. 684; re-en. Sec. 7408, R.C.M. 1935; R.C.M. 1947, -212.

Part 5

Alternative Obligations

28-1-501. Who may select between alternative performances. If an obligation requires the performance of one of two acts in the alternative the party required to perform has the right of selection unless it is otherwise provided by the terms of the obligation.

History: En. Sec. 1970, Civ. C. 1895; re-en. Sec. 4907, Rev. C. 1907; re-en. Sec. 7409, R.C.M 1921; Cal. Civ. C. Sec. 1448; Field Civ. C. Sec. 685; re-en. Sec. 7409, R.C.M. 1935; R.C.M. 1947 58-213.

28-1-502. How right of selection lost. If the party having the right of selection between alternative acts does not give notice of his selection to the other party within the time, if any, fixed by the obligation for that purpose or, if none is so fixed, before the time at which the obligation ought to be performed, the right of selection passes to the other party.

History: En. Sec. 1971, Civ. C. 1895; re-en. Sec. 4908, Rev. C. 1907; re-en. Sec. 7410, R.C.M 1921; Cal. Civ. C. Sec. 1449; Field Civ. C. Sec. 686; re-en. Sec. 7410, R.C.M. 1935; R.C.M. 1947 58-214.

28-1-503. One alternative to be selected in its entirety. The party having the right of selection between alternative acts must select one of them in its entirety and cannot select part of one and part of another without the consent of the other party.

History: En. Sec. 1972, Civ. C. 1895; re-en. Sec. 4909, Rev. C. 1907; re-en. Sec. 7411, R.C.M 1921; Cal. Civ. C. Sec. 1450; Field Civ. C. Sec. 687; re-en. Sec. 7411, R.C.M. 1935; R.C.M. 1947 58-215.

28-1-504. When obligation to be interpreted as though a particular alternative did not exist. If one of the alternative acts required by an obligation is such as the law will not enforce or becomes unlawful or impossible of performance, the obligation is to be interpreted as though the other or others stood alone.

History: En. Sec. 1973, Civ. C. 1895; re-en. Sec. 4910, Rev. C. 1907; re-en. Sec. 7412, R.C.M. 1921; Cal. Civ. C. Sec. 1451; Field Civ. C. Sec. 688; re-en. Sec. 7412, R.C.M. 1935; R.C.M. 1947, 58-216; amd. Sec. 2, Ch. 117, L. 1979.

Parts 6 through 9 reserved

Part 10

Transfer of Rights and Duties Under Obligation

28-1-1001. Rights arising out of obligation transferable. A right arising out of an obligation is the property of the person to whom it is due and may be transferred as such.

History: En. Sec. 1981, Civ. C. 1895; re-en. Sec. 4912, Rev. C. 1907; re-en. Sec. 7414, R.C.M. 1921; Cal. Civ. C. Sec. 1458; Field Civ. C. Sec. 690; re-en. Sec. 7414, R.C.M. 1935; R.C.M. 1947, 58-302.

28-1-1002. When burden of obligation may be transferred. The burden of an obligation may be transferred with the consent of the party titled to its benefits, but not otherwise, except as provided by Title 70, apter 17, part 2.

istory: En. Sec. 1980, Civ. C. 1895; re-en. Sec. 4911, Rev. C. 1907; re-en. Sec. 7413, R.C.M. 21; Cal. Civ. C. Sec. 1457; Field Civ. C. Sec. 689; re-en. Sec. 7413, R.C.M. 1935; R.C.M. 1947, 301; amd. Sec. 3, Ch. 117, L. 1979.

Part 11

Extinction of Obligation by Performance

28-1-1101. Extinction of obligation by full performance. Full rformance of an obligation by the party whose duty it is to perform it or any other person on his behalf and with his assent, if accepted by the editor, extinguishes it.

istory: En. Sec. 2000, Civ. C. 1895; re-en. Sec. 4922, Rev. C. 1907; re-en. Sec. 7424, R.C.M. 1; Cal. Civ. C. Sec. 1473; Field Civ. C. Sec. 699; re-en. Sec. 7424, R.C.M. 1935; R.C.M. 1947, 401.

28-1-1102. Performance by one of several joint debtors. Performance of an obligation by one of several persons who are jointly liable under extinguishes the liability of all.

istory: En. Sec. 2001, Civ. C. 1895; re-en. Sec. 4923, Rev. C. 1907; re-en. Sec. 7425, R.C.M. 1; Cal. Civ. C. Sec. 1474; Field Civ. C. Sec. 700; re-en. Sec. 7425, R.C.M. 1935; R.C.M. 1947, 402.

28-1-1103. Performance to one of several joint creditors. An ligation in favor of several persons is extinguished by performance ndered to any of them, except in the case of a deposit made by owners in mmon or in joint ownership, which is regulated by Title 70, chapter 6.

istory: En. Sec. 2002, Civ. C. 1895; re-en. Sec. 4924, Rev. C. 1907; re-en. Sec. 7426, R.C.M. 1; Cal. Civ. C. Sec. 1475; Field Civ. C. Sec. 701; re-en. Sec. 7426, R.C.M. 1935; R.C.M. 1947, 403; amd. Sec. 4, Ch. 117, L. 1979.

28-1-1104. Extinction when directions of creditor followed. If a editor or any one of two or more joint creditors at any time directs the btor to perform his obligations in a particular manner, the obligation is inguished by performance in that manner even though the creditor does t receive the benefit of such performance.

istory: En. Sec. 2003, Civ. C. 1895; re-en. Sec. 4925, Rev. C. 1907; re-en. Sec. 7427, R.C.M. 1; Cal. Civ. C. Sec. 1476; Field Civ. C. Sec. 702; re-en. Sec. 7427, R.C.M. 1935; R.C.M. 1947, 404.

28-1-1105. When partial performance extinguishes part of ligation. Partial performance of an indivisible obligation extinguishes a responding proportion thereof if the benefit of such performance is voluntily retained by the creditor, but not otherwise. If such partial performance of such a nature that the creditor cannot avoid retaining it without injur- his own property, his retention thereof is not presumed to be voluntary.

istory: En. Sec. 2004, Civ. C. 1895; re-en. Sec. 4926, Rev. C. 1907; re-en. Sec. 7428, R.C.M. 1; Cal. Civ. C. Sec. 1477; Field Civ. C. Sec. 703; re-en. Sec. 7428, R.C.M. 1935; R.C.M. 1947, 405.

28-1-1106. Application of performance when there are several ligations. Whenever a debtor under several obligations to another does an act by way of performance, in whole or in part, which is equally applicable to two or more of such obligations, such performance must be applied a follows:

(1) If, at the time of performance, the intention or desire of the debto that such performance should be applied to the extinction of any particula obligation is manifested to the creditor, it must be so applied.

(2) If no such intention or desire is then manifested, the creditor, withi a reasonable time after such performance, may apply it toward the extinctio of any obligation performance of which was due to him from the debtor a the time of such performance, except that if similar obligations were due t him, both individually and as a trustee, he must, unless otherwise directe by the debtor, apply the performance to the extinction of all such obligation in equal proportion. An application once made by the creditor cannot b rescinded without the consent of the debtor.

(3) If application is not made as prescribed in subsection (1) or (2) withi the time prescribed, the performance must be applied to the extinction o obligations in the following order and, if there is more than one obligatio of a particular class, to the extinction of all in that class, ratably:

(a) first—interest due at the time of the performance;
(b) second—principal due at that time;
(c) third—the obligation earliest in date of maturity;
(d) fourth—an obligation not secured by a lien or collateral undertaking;
(e) fifth—an obligation secured by a lien or collateral undertaking.

History: En. Sec. 2006, Civ. C. 1895; re-en. Sec. 4928, Rev. C. 1907; re-en. Sec. 7430, R.C.M 1921; Cal. Civ. C. Sec. 1479; Based on Field Civ. C. Sec. 705; re-en. Sec. 7430, R.C.M. 1935; R.C.M 1947, 58-407; amd. Sec. 5, Ch. 117, L. 1979.

28-1-1107 through 28-1-1110 reserved.

28-1-1111. Receipt for money, instrument, or property delivered. Whoever pays money or delivers an instrument or property is entitle to a written receipt therefor from the person to whom the payment or delivery is made and may demand a proper signature to such receipt as a condition of the payment or delivery.

History: (1)En. Sec. 3411, C. Civ. Proc. 1895; re-en. Sec. 8037, Rev. C. 1907; re-en. Sec. 10681 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2075; re-en. Sec. 10681, R.C.M. 1935; Sec. 93-2201-2, R.C.M 1947; (2)En. Sec. 2034, Civ. C. 1895; re-en. Sec. 4943, Rev. C. 1907; re-en. Sec. 7445, R.C.M. 1921 Cal. Civ. C. Sec. 1499; Field Civ. C. Sec. 720; re-en. Sec. 7445, R.C.M. 1935; Sec. 58-422, R.C.M 1947; R.C.M. 1947, 58-422, 93-2201-2; amd. Sec. 6, Ch. 117, L. 1979.

28-1-1112. Objections to tender — waiver. The person to whom tender is made must at the time specify any objection he may have to th money, instrument, or property or he must be deemed to have waived it; an if the objections be to the amount of money, the terms of the instrument or the amount or kind of property, he must specify the amount, terms, o kind which he requires or be precluded from objecting afterward.

History: En. Sec. 3412, C. Civ. Proc. 1895; re-en. Sec. 8038, Rev. C. 1907; re-en. Sec. 10682 R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2076; re-en. Sec. 10682, R.C.M. 1935; R.C.M. 1947, 93-2201-3.

28-1-1113. Creditor's retention of thing which he refuses t accept. If anything is given to a creditor by way of performance, which h efuses to accept as such, he is not bound to return it without demand but, he retains it, he is a gratuitous depositary thereof.

History: En. Sec. 2040, Civ. C. 1895; re-en. Sec. 4949, Rev. C. 1907; re-en. Sec. 7451, R.C.M. 921; Cal. Civ. C. Sec. 1505; Field Civ. C. Sec. 726; re-en. Sec. 7451, R.C.M. 1935; R.C.M. 1947, 3-428.

Part 12

Extinction of Obligation by Offer of Performance

28-1-1201. When obligation extinguished by offer of performance. An obligation is extinguished by an offer of performance made in onformity to the rules prescribed in this part and with intent to extinguish e obligation.

History: En. Sec. 2020, Civ. C. 1895; re-en. Sec. 4929, Rev. C. 1907; re-en. Sec. 7431, R.C.M. 21; Cal. Civ. C. Sec. 1485; Field Civ. C. Sec. 706; re-en. Sec. 7431, R.C.M. 1935; R.C.M. 1947, -408.

28-1-1202. Effect of offer. (1) An offer in writing to pay a particular m of money or to deliver a written instrument or specific personal property , if not accepted, equivalent to the actual production and tender of the oney, instrument, or property.

(2) An offer of payment or other performance duly made stops the nning of interest on the obligation and has the same effect upon all incients of the obligation as a performance thereof, whether or not the title to ything offered is transferred to the creditor.

History: (1)En. Sec. 3410, C. Civ. Proc. 1895; re-en. Sec. 8036, Rev. C. 1907; re-en. Sec. 10680, C.M. 1921; Cal. C. Civ. Proc. Sec. 2074; re-en. Sec. 10680, R.C.M. 1935; Sec. 93-2201-1, R.C.M. 47; (2)En. Sec. 2039, Civ. C. 1895; re-en. Sec. 4948, Rev. C. 1907; re-en. Sec. 7450, R.C.M. 1921; l. Civ. C. Sec. 1504; Field Civ. C. Sec. 725; re-en. Sec. 7450, R.C.M. 1935; Sec. 58-427, R.C.M. 47; R.C.M. 1947, 58-427, 93-2201-1; amd. Sec. 7, Ch. 117, L. 1979.

28-1-1203. Offer of partial performance ineffective. An offer of rtial performance is of no effect.

History: En. Sec. 2021, Civ. C. 1895; re-en. Sec. 4930, Rev. C. 1907; re-en. Sec. 7432, R.C.M. 21; Cal. Civ. C. Sec. 1486; Field Civ. C. Sec. 707; re-en. Sec. 7432, R.C.M. 1935; R.C.M. 1947, -409.

28-1-1204. Who must make offer of performance. An offer of performance must be made by the debtor or by some person on his behalf and th his assent.

History: En. Sec. 2022, Civ. C. 1895; re-en. Sec. 4931, Rev. C. 1907; re-en. Sec. 7433, R.C.M. 21; Cal. Civ. C. Sec. 1487; Field Civ. C. Sec. 708; re-en. Sec. 7433, R.C.M. 1935; R.C.M. 1947, -410.

28-1-1205. To whom offer must be made. An offer of performance ust be made to the creditor, to any one or more joint creditors, or to a rson authorized by one or more of them to receive or collect what is due der the obligation.

History: En. Sec. 2023, Civ. C. 1895; re-en. Sec. 4932, Rev. C. 1907; re-en. Sec. 7434, R.C.M. 21; Cal. Civ. C. Sec. 1488; Based on Field Civ. C. Sec. 709; re-en. Sec. 7434, R.C.M. 1935; R.C.M. 17, 58-411; amd. Sec. 8, Ch. 117, L. 1979.

28-1-1206. Where offer may be made. In the absence of an express provision to the contrary, an offer of performance may be made, at the option of the debtor:

(1) at any place appointed by the creditor;

(2) wherever the person to whom the offer ought to be made can be found;

(3) if such person cannot, with reasonable diligence, be found within the state and within a reasonable distance from his residence or place of business or if he evades the debtor, then at his residence or place of business if the same can, with reasonable diligence, be found within the state; or

(4) if this cannot be done, then at any place within this state.

History: En. Sec. 2024, Civ. C. 1895; re-en. Sec. 4933, Rev. C. 1907; re-en. Sec. 7435, R.C.M 1921; Cal. Civ. C. Sec. 1489; Field Civ. C. Sec. 710; re-en. Sec. 7435, R.C.M. 1935; R.C.M. 1947 58-412.

28-1-1207. When offer must be made. (1) Where an obligation fixes a time for its performance, an offer of performance must be made at that time, within reasonable hours, and not before or afterwards.

(2) Where an obligation does not fix the time for its performance, an offer of performance may be made at any time before the debtor, upon reasonable demand, has refused to perform.

History: (1)En. Sec. 2025, Civ. C. 1895; re-en. Sec. 4934, Rev. C. 1907; re-en. Sec. 7436, R.C.M, 1921; Cal. Civ. C. Sec. 1490; Field Civ. C. Sec. 711; re-en. Sec. 7436, R.C.M. 1935; Sec. 58-413, R.C.M. 1947; (2)En. Sec. 2026, Civ. C. 1895; re-en. Sec. 4935, Rev. C. 1907; re-en. Sec. 7437, R.C.M 1921; Cal. Civ. C. Sec. 1491; Field Civ. C. Sec. 712; re-en. Sec. 7437, R.C.M. 1935; Sec. 58-414, R.C.M. 1947; R.C.M. 1947, 58-413, 58-414.

28-1-1208. Offer of late performance with compensation. Where delay in performance is capable of exact and entire compensation and time has not been expressly declared to be of the essence of the obligation, an offer of performance accompanied with an offer of such compensation may be made at any time after it is due, but without prejudice to any rights acquired by the creditor or by any other person in the meantime.

History: En. Sec. 2027, Civ. C. 1895; re-en. Sec. 4936, Rev. C. 1907; re-en. Sec. 7438, R.C.M 1921; Cal. Civ. C. Sec. 1492; Field Civ. C. Sec. 713; re-en. Sec. 7438, R.C.M. 1935; R.C.M. 1947, 58-415.

28-1-1209. Offer to be made in good faith. An offer of performance must be made in good faith and in such manner as is most likely, under the circumstances, to benefit the creditor.

History: En. Sec. 2028, Civ. C. 1895; re-en. Sec. 4937, Rev. C. 1907; re-en. Sec. 7439, R.C.M 1921; Cal. Civ. C. Sec. 1493; Field Civ. C. Sec. 714; re-en. Sec. 7439, R.C.M. 1935; R.C.M. 1947 58-416.

28-1-1210. Offeror to be able and willing to perform. An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer.

History: En. Sec. 2030, Civ. C. 1895; re-en. Sec. 4939, Rev. C. 1907; re-en. Sec. 7441, R.C.M 1921; Cal. Civ. C. Sec. 1495; Field Civ. C. Sec. 716; re-en. Sec. 7441, R.C.M. 1935; R.C.M. 1947 58-418.

28-1-1211. When offer may be conditional. (1) An offer of performance must be free from any conditions which the creditor is not bound, on his part, to perform.

(2) When a debtor is entitled to the performance of a condition precedent o or concurrent with performance on his part, he may make his offer depend pon the due performance of such condition.

History: En. Secs. 2029, 2033, Civ. C. 1895; re-en. Secs. 4938, 4942, Rev. C. 1907; re-en. Secs. 440, 7444, R.C.M. 1921; Cal. Civ. C. Secs. 1494, 1498; Field Civ. C. Secs. 715, 719; re-en. Secs. 440, 7444, R.C.M. 1935; R.C.M. 1947, 58-417, 58-421.

28-1-1212. Objections to mode of offer — waiver. All objections o the mode of an offer of performance which the creditor has an opportunity o state at the time to the person making the offer and which could then be bviated by such person are waived by the creditor if not then stated. If the bjection is to the amount of money, the terms of the instrument, or the mount or kind of property offered, the creditor must specify the amount, erms, or kind which he requires.

History: En. Sec. 2036, Civ. C. 1895; re-en. Sec. 4945, Rev. C. 1907; re-en. Sec. 7447, R.C.M. 921; Cal. Civ. C. Sec. 1501; Field Civ. C. Sec. 722; re-en. Sec. 7447, R.C.M. 1935; R.C.M. 1947, 8-424; amd. Sec. 9, Ch. 117, L. 1979.

28-1-1213 through 28-1-1220 reserved.

28-1-1221. Title to thing offered. The title to a thing duly offered n performance of an obligation passes to the creditor if the debtor at the ime signifies his intention to that effect.

History: En. Sec. 2037, Civ. C. 1895; re-en. Sec. 4946, Rev. C. 1907; re-en. Sec. 7448, R.C.M. 921; Cal. Civ. C. Sec. 1502; Field Civ. C. Sec. 723; re-en. Sec. 7448, R.C.M. 1935; R.C.M. 1947, 8-425.

28-1-1222. Production of thing to be delivered. The thing to be elivered, if any, need not in any case be actually produced upon an offer f performance unless the offer is accepted.

History: En. Sec. 2031, Civ. C. 1895; re-en. Sec. 4940, Rev. C. 1907; re-en. Sec. 7442, R.C.M. 921; Cal. Civ. C. Sec. 1496; Field Civ. C. Sec. 717; re-en. Sec. 7442, R.C.M. 1935; R.C.M. 1947, 8-419.

28-1-1223. Thing offered to be kept separate. A thing, when ffered by way of performance, must not be mixed with other things from hich it cannot be separated immediately and without difficulty.

History: En. Sec. 2032, Civ. C. 1895; re-en. Sec. 4941, Rev. C. 1907; re-en. Sec. 7443, R.C.M. 921; Cal. Civ. C. Sec. 1497; Field Civ. C. Sec. 718; re-en. Sec. 7443, R.C.M. 1935; R.C.M. 1947, 8-420.

28-1-1224. Custody of thing other than money. The person offer- ng a thing other than money by way of performance must, if he means to eat it as belonging to the creditor, retain it as a depositary for hire until e creditor accepts it or until he has given reasonable notice to the creditor at he will retain it no longer and, if with reasonable diligence he can find suitable depositary therefor, until he has deposited it with such person.

History: En. Sec. 2038, Civ. C. 1895; re-en. Sec. 4947, Rev. C. 1907; re-en. Sec. 7449, R.C.M. 921; Cal. Civ. C. Sec. 1503; Field Civ. C. Sec. 724; re-en. Sec. 7449, R.C.M. 1935; R.C.M. 1947, 8-426.

28-1-1225. Deposit of money offered in payment. An obligation r the payment of money is extinguished by a due offer of payment if the mount is immediately deposited in the name of the creditor with some bank of deposit within this state of good repute and notice thereof is given to the creditor.

History: En. Sec. 2035, Civ. C. 1895; re-en. Sec. 4944, Rev. C. 1907; re-en. Sec. 7446, R.C.M 1921; Cal. Civ. C. Sec. 1500; Field Civ. C. Sec. 721; re-en. Sec. 7446, R.C.M. 1935; R.C.M. 1947 58-423.

Part 13

Prevention of Performance

28-1-1301. When delay or failure to perform or offer to perform excused. The want of performance of an obligation or of an offer of performance, in whole or in part, or any delay therein is excused by the following causes, to the extent to which they operate:

(1) when such performance or offer is prevented or delayed by the act of the creditor or by the operation of law, even though there may have been a stipulation that this shall not be an excuse;

(2) when it is prevented or delayed by an irresistible, superhuman cause or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; or

(3) when the debtor is induced not to make it by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time.

History: En. Sec. 2050, Civ. C. 1895; re-en. Sec. 4950, Rev. C. 1907; re-en. Sec. 7452, R.C.M. 1921; Cal. Civ. C. Sec. 1511; Field Civ. C. Sec. 727; re-en. Sec. 7452, R.C.M. 1935; R.C.M. 1947, 58-429.

28-1-1302. Effect when performance prevented by creditor. If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties.

History: En. Sec. 2051, Civ. C. 1895; re-en. Sec. 4951, Rev. C. 1907; re-en. Sec. 7453, R.C.M. 1921; Cal. Civ. C. Sec. 1512; Field Civ. C. Sec. 728; re-en. Sec. 7453, R.C.M. 1935; R.C.M. 1947, 58-430.

28-1-1303. Effect when performance prevented by other causes. If full performance of an obligation is prevented by any cause excusing performance other than the act of the creditor, the debtor is entitled to a ratable proportion of the consideration to which he would have been entitled upon full performance, according to the benefit which the creditor receives from the actual performance.

History: En. Sec. 2052, Civ. C. 1895; re-en. Sec. 4952, Rev. C. 1907; re-en. Sec. 7454, R.C.M. 1921; Cal. Civ. C. Sec. 1514; re-en. Sec. 7454, R.C.M. 1935; R.C.M. 1947, 58-431; amd. Sec. 10, Ch. 117, L. 1979.

28-1-1304. Effect of refusal to accept performance before offer. A refusal by a creditor to accept performance, made before an offer thereof, is equivalent to an offer and refusal unless, before performance is actually due, he gives notice to the debtor of his willingness to accept it.

History: En. Sec. 2053, Civ. C. 1895; re-en. Sec. 4953, Rev. C. 1907; re-en. Sec. 7455, R.C.M. 1921; Cal. Civ. C. Sec. 1515; Field Civ. C. Sec. 731; re-en. Sec. 7455, R.C.M. 1935; R.C.M. 1947, 58-432.

Part 14

Accord and Satisfaction

28-1-1401. Accord — definition and effect. An accord is an agreenent to accept in extinction of an obligation something different from or less han that to which the person agreeing to accept is entitled. Though the paries to an accord are bound to execute it, yet it does not extinguish the obliation until it is fully executed.

History: Ap. p. Sec. 2060, Civ. C. 1895; re-en. Sec. 4954, Rev. C. 1907; re-en. Sec. 7456, R.C.M. 921; Cal. Civ. C. Sec. 1521; Based on Field Civ. C. Sec. 732; re-en. Sec. 7456, R.C.M. 1935; Sec. 8-501, R.C.M. 1947; Ap. p. Sec. 2061, Civ. C. 1895; re-en. Sec. 4955, Rev. C. 1907; re-en. Sec. 7457, R.C.M. 1921; Cal. Civ. C. Sec. 1522; Field Civ. C. Sec. 733; re-en. Sec. 7457, R.C.M. 1935; Sec. 8-502, R.C.M. 1947; R.C.M. 1947, 58-501, 58-502.

28-1-1402. Satisfaction — definition and effect. Acceptance by the creditor of the consideration of an accord extinguishes the obligation and is alled satisfaction.

History: En. Sec. 2062, Civ. C. 1895; re-en. Sec. 4956, Rev. C. 1907; re-en. Sec. 7458, R.C.M. 921; Cal. Civ. C. Sec. 1523; Field Civ. C. Sec. 734; re-en. Sec. 7458, R.C.M. 1935; R.C.M. 1947, 8-503.

28-1-1403. When part performance extinguishes obligation. Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing in satisfaction or rendered n pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation.

History: En. Sec. 2063, Civ. C. 1895; re-en. Sec. 4957, Rev. C. 1907; re-en. Sec. 7459, R.C.M. 921; Cal. Civ. C. Sec. 1524; re-en. Sec. 7459, R.C.M. 1935; R.C.M. 1947, 58-504.

Part 15

Novation

28-1-1501. Novation defined. "Novation" is the substitution of a new obligation for an existing one.

History: En. Sec. 2070, Civ. C. 1895; re-en. Sec. 4958, Rev. C. 1907; re-en. Sec. 7460, R.C.M. 921; Cal. Civ. C. Sec. 1530; Field Civ. C. Sec. 736; re-en. Sec. 7460, R.C.M. 1935; R.C.M. 1947, 8-505.

28-1-1502. Kinds of novation. Novation is made by the substitution f:

(1) a new obligation between the same parties with intent to extinguish he old obligation;

(2) a new debtor in place of the old one with intent to release the latter; r

(3) a new creditor in place of the old one with intent to transfer the ights of the latter to the former.

History: En. Sec. 2071, Civ. C. 1895; re-en. Sec. 4959, Rev. C. 1907; re-en. Sec. 7461, R.C.M. 921; Cal. Civ. C. Sec. 1531; Field Civ. C. Sec. 737; re-en. Sec. 7461, R.C.M. 1935; R.C.M. 1947, 8-506.

28-1-1503. How novation accomplished. Novation is made by contract and is subject to all the rules concerning contracts in general.

History: En. Sec. 2072, Civ. C. 1895; re-en. Sec. 4960, Rev. C. 1907; re-en. Sec. 7462, R.C.M 1921; Cal. Civ. C. Sec. 1532; Field Civ. C. Sec. 738; re-en. Sec. 7462, R.C.M. 1935; R.C.M. 194 58-507.

28-1-1504. When acceptance of novation may be rescinded When the obligation of a third person or an order upon such person i accepted in satisfaction, the creditor may rescind such acceptance if:

(1) the debtor prevents such person from complying with the order o from fulfilling the obligation;

(2) at the time the obligation or order is received, such person is insolven and the fact is unknown to the creditor; or

(3) before the creditor can, with reasonable diligence, present the order t the person upon whom it is given, he becomes insolvent.

History: En. Sec. 2073, Civ. C. 1895; re-en. Sec. 4961, Rev. C. 1907; re-en. Sec. 7463, R.C.M 1921; Cal. Civ. C. Sec. 1533; Based on Field Civ. C. Sec. 740; re-en. Sec. 7463, R.C.M. 1935; R.C.M 1947, 58-508.

Part 16

Release of Debtor by Creditor

28-1-1601. Extinction of obligation by a release. An obligation is extinguished by a release therefrom given to the debtor by the creditor upon a new consideration or in writing, with or without new consideration.

History: En. Sec. 2080, Civ. C. 1895; re-en. Sec. 4962, Rev. C. 1907; re-en. Sec. 7464, R.C.M. 1921; Cal. Civ. C. Sec. 1541; Based on Field Civ. C. Sec. 741; re-en. Sec. 7464, R.C.M. 1935; R.C.M. 1947, 58-509.

28-1-1602. What claims survive general release. A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which, if known by him, must have materially affected his settlement with the debtor.

History: En. Sec. 2081, Civ. C. 1895; re-en. Sec. 4963, Rev. C. 1907; re-en. Sec. 7465, R.C.M. 1921; Cal. Civ. C. Sec. 1542; Based on Field Civ. C. Sec. 742; re-en. Sec. 7465, R.C.M. 1935; R.C.M. 1947, 58-510.

28-1-1603. Effect of release of some but not all joint debtors. A release of one of two or more joint debtors does not extinguish the obligation of any of the others unless they are mere guarantors, nor does it affect their rights to contribution from him.

History: En. Sec. 2082, Civ. C. 1895; re-en. Sec. 4964, Rev. C. 1907; re-en. Sec. 7466, R.C.M. 1921; Cal. Civ. C. Sec. 1543; Field Civ. C. Sec. 743; re-en. Sec. 7466, R.C.M. 1935; R.C.M. 1947, 58-511.

CHAPTER 2

CONTRACTS

Part 1 — General Provisions

Section
28-2-101. Contract defined.
28-2-102. Essential elements of a contract.

8-2-103. Express versus implied contracts.
8-2-104. Executed versus executory contracts.

Part 2 — Parties

8-2-201. Who may contract.
8-2-202. Contracts of persons entirely without understanding.
8-2-203. Contracts of persons with limited understanding.
8-2-204. When person of unsound mind cannot disaffirm contract.
8-2-205. When contract for benefit of third person may be enforced by him.
8-2-206. Assignment of nonnegotiable written contract.

Part 3 — Consent in General

8-2-301. Essential characteristics of consent.
8-2-302. Effect of consent which is not free.
8-2-303. When consent is mutual.
8-2-304. Ratification of contract void for want of consent.

Part 4 — Circumstances Which Affect Validity of Apparent Consent

8-2-401. When apparent consent not free.
8-2-402. What constitutes duress.
8-2-403. What constitutes menace.
8-2-404. Kinds of fraud.
8-2-405. What constitutes actual fraud.
8-2-406. What constitutes constructive fraud.
8-2-407. What constitutes undue influence.
8-2-408. Kinds of mistake.
8-2-409. What constitutes mistake of fact.
8-2-410. What constitutes mistake of law.
8-2-411. Mistake of foreign laws — mistake of fact.

Part 5 — Communication of Consent Revocation of Proposal

8-2-501. How consent is communicated.
8-2-502. When consent is considered fully communicated.
8-2-503. Implied acceptance.
8-2-504. Acceptance to be absolute.
Sections 28-2-505 through 28-2-510 reserved.
8-2-511. When proposal may be revoked.
8-2-512. How proposal revoked.

Part 6 — Object of a Contract

8-2-601. Object of contract defined.
8-2-602. Essential characteristics of object.
8-2-603. When contract wholly void.
8-2-604. When contract partially void.

Part 7 — Illegal Objects and Provisions

8-2-701. What is unlawful.
8-2-702. Contracts which violate policy of the law — exemption from responsibility.
8-2-703. Contracts in restraint of trade generally void.
8-2-704. Exception — sale of goodwill of business.
8-2-705. Exception — dissolution of partnership.
8-2-706. Contracts in restraint of marriage generally void.
8-2-707. What conditions void.
8-2-708. Restraints upon legal proceedings void.
8-2-709. Illegality of agreement to allow another person to confess judgment, accept service of process, or accept default.

Sections 28-2-710 through 28-2-720 reserved.
28-2-721. When provision fixing liquidated damages valid.
28-2-722. Contracts for personal services limited to two years.

Part 8 — Consideration

28-2-801. What constitutes good consideration.
28-2-802. Extent to which existing legal or moral obligation is good consideration.
28-2-803. Consideration to be lawful — effect of illegality.
28-2-804. Written instrument presumptive evidence of consideration.
28-2-805. Burden of proof of want of consideration.
Sections 28-2-806 through 28-2-810 reserved.
28-2-811. Applicability of rules concerning object to executory consideration.
28-2-812. How amount of executory consideration may be determined.
28-2-813. Determination by interested party.
28-2-814. Effect of impossibility of designated exclusive method of determination.

Part 9 — Written Contracts

28-2-901. When contracts may be oral.
28-2-902. Enforcement of contract not in writing through fraud.
28-2-903. What contracts must be in writing.
28-2-904. Effect of written contract on oral agreements.
28-2-905. When extrinsic evidence concerning a written agreement may be considered.
28-2-906. When written contract takes effect.
28-2-907. Applicability of rules concerning transfers in general.

Parts 10 through 14 reserved

Part 15 — Enforcement of Contracts

28-2-1501. When successive actions on same contract permitted.

Part 16 — Modification of Contracts

28-2-1601. Alteration of oral contract by parties.
28-2-1602. How written contract may be altered by parties.
Sections 28-2-1603 through 28-2-1610 reserved.
28-2-1611. When written contract may be revised by court.
28-2-1612. Presumption that parties intended equitable agreement.
28-2-1613. Scope of court's inquiry.
28-2-1614. Specific enforcement of revised contract.

Part 17 — Extinction of Contracts—Rescission

28-2-1701. How contract extinguished.
28-2-1702. Extinction of written contract by destruction or cancellation.
28-2-1703. Extinction of executory obligations of contract by destruction, cancellation, or alteration.
Sections 28-2-1704 through 28-2-1710 reserved.
28-2-1711. When party may rescind.
28-2-1712. When stipulation against rescission ineffective.
28-2-1713. How rescission accomplished.
28-2-1714. When rescission may be adjudged.
28-2-1715. When rescission may be adjudged for mistake.
28-2-1716. Power of court to require party rescinding to do equity.

Part 1

General Provisions

28-2-101. Contract defined. A contract is an agreement to do or not do a certain thing.

History: En. Sec. 2090, Civ. C. 1895; re-en. Sec. 4965, Rev. C. 1907; re-en. Sec. 7467, R.C.M. 21; Cal. Civ. C. Sec. 1549; Field Civ. C. Sec. 744; re-en. Sec. 7467, R.C.M. 1935; R.C.M. 1947, -101.

28-2-102. Essential elements of a contract. It is essential to the xistence of a contract that there be:

(1) identifiable parties capable of contracting;
(2) their consent;
(3) a lawful object; and
(4) a sufficient cause or consideration.

History: En. Secs. 2091, 2102, Civ. C. 1895; re-en. Secs. 4966, 4969, Rev. C. 1907; re-en. Secs. 68, 7471, R.C.M. 1921; Cal. Civ. C. Secs. 1550, 1558; Field Civ. C. Secs. 745, 748; re-en. Secs. 68, 7471, R.C.M. 1935; R.C.M. 1947, 13-102, 13-203; amd. Sec. 11, Ch. 117, L. 1979.

28-2-103. Express versus implied contracts. A contract is either xpress or implied. An express contract is one the terms of which are stated words. An implied contract is one the existence and terms of which are anifested by conduct.

History: En. Secs. 2180, 2181, 2182, Civ. C. 1895; re-en. Secs. 5012, 5013, 5014, Rev. C. 1907; -en. Secs. 7514, 7515, 7516, R.C.M. 1921; Cal. Civ. C. Secs. 1619, 1620, 1621; Field Civ. C. Secs. 9, 790, 791; re-en. Secs. 7514, 7515, 7516, R.C.M. 1935; R.C.M. 1947, 13-601, 13-602, 13-603.

28-2-104. Executed versus executory contracts. An executed con-act is one the object of which is fully performed. All others are executory.

History: En. Sec. 2226, Civ. C. 1895; re-en. Sec. 5050, Rev. C. 1907; re-en. Sec. 7552, R.C.M. 21; Cal. Civ. C. Sec. 1661; Field Civ. C. Sec. 826; re-en. Sec. 7552, R.C.M. 1935; R.C.M. 1947, -727.

Part 2

Parties

28-2-201. Who may contract. All persons are capable of contracting cept minors, persons of unsound mind, and persons deprived of civil rights. inors and persons of unsound mind have only such capacity as is defined this part, 28-10-104, and Title 41, chapter 1.

History: En. Secs. 2100, 2101, Civ. C. 1895; re-en. Secs. 4967, 4968, Rev. C. 1907; re-en. Secs. 69, 7470, R.C.M. 1921; Cal. Civ. C. Secs. 1556, 1557; Field Civ. C. Secs. 746, 747; re-en. Secs. 69, 7470, R.C.M. 1935; R.C.M. 1947, 13-201, 13-202; amd. Sec. 12, Ch. 117, L. 1979.

28-2-202. Contracts of persons entirely without understanding. person entirely without understanding has no power to make a contract of y kind, but he is liable for the reasonable value of things furnished to him ecessary for his support or the support of his family.

History: En. Sec. 21, Civ. C. 1895; re-en. Sec. 3595, Rev. C. 1907; re-en. Sec. 5683, R.C.M. 1921; l. Civ. C. Sec. 38; re-en. Sec. 5683, R.C.M. 1935; re-en. Sec. 5683, R.C.M. 1935; R.C.M. 1947, -110.

28-2-203. Contracts of persons with limited understanding. A conveyance or other contract of a person of unsound mind but not entirely without understanding, made before his incapacity has been judicially determined, is subject to rescission as provided in part 17 of this chapter.

History: En. Sec. 22, Civ. C. 1895; re-en. Sec. 3596, Rev. C. 1907; re-en. Sec. 5684, R.C.M. 1921; Cal. Civ. C. Sec. 39; Field Civ. C. Sec. 21; re-en. Sec. 5684, R.C.M. 1935; R.C.M. 1947, 64-111.

28-2-204. When person of unsound mind cannot disaffirm contract. A person of unsound mind cannot disaffirm a contract, otherwise valid, to pay the reasonable value of things necessary for his support or that of his family, entered into by him when not under the care of a parent or guardian able to provide for him or them.

History: En. Sec. 19, Civ. C. 1895; re-en. Sec. 3593, Rev. C. 1907; re-en. Sec. 5681, R.C.M. 1921; Cal. Civ. C. Sec. 36; Field Civ. C. Sec. 18; re-en. Sec. 5681, R.C.M. 1935; R.C.M. 1947, 64-108(part).

28-2-205. When contract for benefit of third person may be enforced by him. A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.

History: En. Sec. 2103, Civ. C. 1895; re-en. Sec. 4970, Rev. C. 1907; re-en. Sec. 7472, R.C.M. 1921; Cal. Civ. C. Sec. 1559; Field Civ. C. Sec. 749; re-en. Sec. 7472, R.C.M. 1935; R.C.M. 1947, 13-204.

28-2-206. Assignment of nonnegotiable written contract. A nonnegotiable written contract for the payment of money or the delivery of personal property may be transferred by endorsement the same as a negotiable instrument. Such endorsement transfers all the rights of the assignor under the contract to the assignee, subject to all equities and defenses existing in favor of the maker at the time of the endorsement or arising before notice of the assignment is received by him.

History: En. Sec. 1982, Civ. C. 1895; re-en. Sec. 4913, Rev. C. 1907; re-en. Sec. 7415, R.C.M. 1921; Cal. Civ. C. Sec. 1459; re-en. Sec. 7415, R.C.M. 1935; R.C.M. 1947, 58-303; amd. Sec. 13, Ch. 117, L. 1979.

Part 3

Consent in General

28-2-301. Essential characteristics of consent. The consent of the parties to a contract must be:

(1) free;
(2) mutual; and
(3) communicated by each to the other.

History: En. Sec. 2110, Civ. C. 1895; re-en. Sec. 4971, Rev. C. 1907; re-en. Sec. 7473, R.C.M. 1921; Cal. Civ. C. Sec. 1565; Field Civ. C. Sec. 750; re-en. Sec. 7473, R.C.M. 1935; R.C.M. 1947, 13-301.

28-2-302. Effect of consent which is not free. A consent which is not free is nevertheless not absolutely void but may be rescinded by the parties in the manner prescribed by part 17 of this chapter.

History: En. Sec. 2111, Civ. C. 1895; re-en. Sec. 4972, Rev. C. 1907; re-en. Sec. 7474, R.C.M. 1921; Cal. Civ. C. Sec. 1566; Field Civ. C. Sec. 751; re-en. Sec. 7474, R.C.M. 1935; R.C.M. 1947, 13-302.

28-2-303. When consent is mutual. Consent is not mutual unless the rties all agree upon the same thing in the same sense, but in certain cases fined by chapter 3, they are to be deemed so to agree without regard to e fact.

History: En. Sec. 2125, Civ. C. 1895; re-en. Sec. 4986, Rev. C. 1907; re-en. Sec. 7488, R.C.M. 21; Cal. Civ. C. Sec. 1580; Field Civ. C. Sec. 765; re-en. Sec. 7488, R.C.M. 1935; R.C.M. 1947, -316.

28-2-304. Ratification of contract void for want of consent. A ntract which is voidable solely for want of due consent may be ratified by subsequent consent.

History: En. Sec. 2133, Civ. C. 1895; re-en. Sec. 4994, Rev. C. 1907; re-en. Sec. 7496, R.C.M. 21; Cal. Civ. C. Sec. 1588; Field Civ. C. Sec. 773; re-en. Sec. 7496, R.C.M. 1935; R.C.M. 1947, -324.

Part 4

Circumstances Which Affect Validity of Apparent Consent

28-2-401. When apparent consent not free. (1) An apparent con- nt is not real or free when obtained through:

(a) duress;
(b) menace;
(c) fraud;
(d) undue influence; or
(e) mistake.

(2) Consent is deemed to have been obtained through one of the causes entioned in subsection (1) only when it would not have been given had ch cause not existed.

History: En. Secs. 2112, 2113, Civ. C. 1895; re-en. Secs. 4973, 4974, Rev. C. 1907; re-en. Secs. 75, 7476, R.C.M. 1921; Cal. Civ. C. Secs. 1567, 1568; Field Civ. C. Secs. 752, 753; re-en. Secs. 75, 7476, R.C.M. 1935; R.C.M. 1947, 13-303, 13-304.

28-2-402. What constitutes duress. Duress consists in:

(1) unlawful confinement of the person of the party, of the husband or fe of such party, or of an ancestor, descendant, or adopted child of such rty, husband, or wife;

(2) unlawful detention of the property of any such person; or

(3) confinement of such person, lawful in form but fraudulently obtained fraudulently made unjustly harassing or oppressive.

istory: En. Sec. 2114, Civ. C. 1895; re-en. Sec. 4975, Rev. C. 1907; re-en. Sec. 7477, R.C.M. 1; Cal. Civ. C. Sec. 1569; Field Civ. C. Sec. 754; re-en. Sec. 7477, R.C.M. 1935; R.C.M. 1947, 305.

28-2-403. What constitutes menace. Menace consists in a threat of:

(1) such duress as is specified in subsections (1) and (3) of 28-2-402;

(2) unlawful and violent injury to the person or property of any such rson in circumstances described in 28-2-402; or

(3) injury to the character of any such person.

istory: En. Sec. 2115, Civ. C. 1895; re-en. Sec. 4976, Rev. C. 1907; re-en. Sec. 7478, R.C.M. 1; Cal. Civ. C. Sec. 1570; Field Civ. C. Sec. 755; re-en. Sec. 7478, R.C.M. 1935; R.C.M. 1947, 306; amd. Sec. 14, Ch. 117, L. 1979.

28-2-404. Kinds of fraud. Fraud is either actual or constructive. Actual fraud is always a question of fact.

History: En. Secs. 2116, 2119, Civ. C. 1895; re-en. Secs. 4977, 4980, Rev. C. 1907; re-en. Secs. 7479, 7482, R.C.M. 1921; Cal. Civ. C. Secs. 1571, 1574; Field Civ. C. Secs. 756, 759; re-en. Secs. 7479, 7482, R.C.M. 1935; R.C.M. 1947, 13-307, 13-310.

28-2-405. What constitutes actual fraud. Actual fraud, within the meaning of this part, consists in any of the following acts committed by a party to the contract or with his connivance with intent to deceive another party thereto or to induce him to enter into the contract:

(1) the suggestion as a fact of that which is not true by one who does not believe it to be true;

(2) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

(3) the suppression of that which is true by one having knowledge or belief of the fact;

(4) a promise made without any intention of performing it; or

(5) any other act fitted to deceive.

History: En. Sec. 2117, Civ. C. 1895; re-en. Sec. 4978, Rev. C. 1907; re-en. Sec. 7480, R.C.M. 1921; Cal. Civ. C. Sec. 1572; Field Civ. C. Sec. 757; re-en. Sec. 7480, R.C.M. 1935; R.C.M. 1947, 13-308.

28-2-406. What constitutes constructive fraud. Constructive fraud consists in:

(1) any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault or anyone claiming under him by misleading another to his prejudice or to the prejudice of anyone claiming under him; or

(2) any such act or omission as the law especially declares to be fraudulent, without respect to actual fraud.

History: En. Sec. 2118, Civ. C. 1895; re-en. Sec. 4979, Rev. C. 1907; re-en. Sec. 7481, R.C.M. 1921; Cal. Civ. C. Sec. 1573; Field Civ. C. Sec. 758; re-en. Sec. 7481, R.C.M. 1935; R.C.M. 1947, 13-309.

28-2-407. What constitutes undue influence. Undue influence consists in:

(1) the use by one in whom a confidence is reposed by another or who holds a real or apparent authority over him of such confidence or authority for the purpose of obtaining an unfair advantage over him;

(2) taking an unfair advantage of another's weakness of mind; or

(3) taking a grossly oppressive and unfair advantage of another's necessities or distress.

History: En. Sec. 2120, Civ. C. 1895; re-en. Sec. 4981, Rev. C. 1907; re-en. Sec. 7483, R.C.M. 1921; Cal. Civ. C. Sec. 1575; Field Civ. C. Sec. 760; re-en. Sec. 7483, R.C.M. 1935; R.C.M. 1947, 13-311.

28-2-408. Kinds of mistake. Mistake may be either of fact or law.

History: En. Sec. 2121, Civ. C. 1895; re-en. Sec. 4982, Rev. C. 1907; re-en. Sec. 7484, R.C.M. 1921; Cal. Civ. C. Sec. 1576; Field Civ. C. Sec. 761; re-en. Sec. 7484, R.C.M. 1935; R.C.M. 1947, 13-312.

28-2-409. What constitutes mistake of fact. Mistake of fact is a mistake not caused by the neglect of a legal duty on the part of the person making the mistake and consisting in:

(1) an unconscious ignorance or forgetfulness of a fact, past or present, aterial to the contract; or

(2) belief in the present existence of a thing material to the contract hich does not exist or in the past existence of such a thing which has not xisted.

History: En. Sec. 2122, Civ. C. 1895; re-en. Sec. 4983, Rev. C. 1907; re-en. Sec. 7485, R.C.M. 21; Cal. Civ. C. Sec. 1577; Field Civ. C. Sec. 762; re-en. Sec. 7485, R.C.M. 1935; R.C.M. 1947, -313.

28-2-410. What constitutes mistake of law. Mistake of law consti- tes a mistake, within the meaning of this part, only when it arises from:

(1) a misapprehension of the law by all parties, all supposing that they new and understood it and all making substantially the same mistake as to e law; or

(2) a misapprehension of the law by one party of which the others are vare at the time of contracting but which they do not rectify.

History: En. Sec. 2123, Civ. C. 1895; re-en. Sec. 4984, Rev. C. 1907; re-en. Sec. 7486, R.C.M. 21; Cal. Civ. C. Sec. 1578; Field Civ. C. Sec. 763; re-en. Sec. 7486, R.C.M. 1935; R.C.M. 1947, -314.

28-2-411. Mistake of foreign laws — mistake of fact. Mistake of reign laws is a mistake of fact.

History: En. Sec. 2124, Civ. C. 1895; re-en. Sec. 4985, Rev. C. 1907; re-en. Sec. 7487, R.C.M. 21; Cal. Civ. C. Sec. 1579; Field Civ. C. Sec. 764; re-en. Sec. 7487, R.C.M. 1935; R.C.M. 1947, -315.

Part 5

Communication of Consent — Revocation of Proposal

28-2-501. How consent is communicated. (1) Consent can be com- unicated with effect only by some act or omission of the party contracting y which he intends to communicate it or which necessarily tends to such mmunication.

(2) If a proposal prescribes any conditions concerning the communication its acceptance, the proposer is not bound unless they are conformed to; t in other cases, any reasonable and usual mode in conformity with subsec- on (1) may be adopted.

History: En. Secs. 2126, 2127, Civ. C. 1895; re-en. Secs. 4987, 4988, Rev. C. 1907; re-en. Secs. 89, 7490, R.C.M. 1921; Cal. Civ. C. Secs. 1581, 1582; Field Civ. C. Secs. 766, 767; re-en. Secs. 89, 7490, R.C.M. 1935; R.C.M. 1947, 13-317, 13-318; amd. Sec. 15, Ch. 117, L. 1979.

28-2-502. When consent is considered fully communicated. Con- nt is considered to be fully communicated between the parties as soon as e party accepting a proposal has put his acceptance in the course of trans- ission to the proposer in conformity with 28-2-501.

History: En. Sec. 2128, Civ. C. 1895; re-en. Sec. 4989, Rev. C. 1907; re-en. Sec. 7491, R.C.M. 21; Cal. Civ. C. Sec. 1583; Field Civ. C. Sec. 768; re-en. Sec. 7491, R.C.M. 1935; R.C.M. 1947, -319; amd. Sec. 16, Ch. 117, L. 1979.

28-2-503. Implied acceptance. (1) Performance of the conditions of proposal or the acceptance of the consideration offered with a proposal is acceptance of the proposal.

(2) A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known or ought to be known to the person accepting.

History: En. Secs. 2129, 2134, Civ. C. 1895; re-en. Secs. 4990, 4995, Rev. C. 1907; re-en. Secs. 7492, 7497, R.C.M. 1921; Cal. Civ. C. Secs. 1584, 1589; Field Civ. C. Secs. 769, 774; re-en. Secs. 7492, 7497, R.C.M. 1935; R.C.M. 1947, 13-320, 13-325.

28-2-504. Acceptance to be absolute. An acceptance must be absolute and unqualified or must include in itself an acceptance of that character which the proposer can separate from the rest and which will bind the person accepting. A qualified acceptance is a new proposal.

History: En. Sec. 2130, Civ. C. 1895; re-en. Sec. 4991, Rev. C. 1907; re-en. Sec. 7493, R.C.M. 1921; Cal. Civ. C. Sec. 1585; Field Civ. C. Sec. 770; re-en. Sec. 7493, R.C.M. 1935; R.C.M. 1947, 13-321; amd. Sec. 17, Ch. 117, L. 1979.

28-2-505 through 28-2-510 reserved.

28-2-511. When proposal may be revoked. A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards.

History: En. Sec. 2131, Civ. C. 1895; re-en. Sec. 4992, Rev. C. 1907; re-en. Sec. 7494, R.C.M. 1921; Cal. Civ. C. Sec. 1586; Field Civ. C. Sec. 771; re-en. Sec. 7494, R.C.M. 1935; R.C.M. 1947, 13-322.

28-2-512. How proposal revoked. A proposal is revoked by:

(1) the communication of notice of revocation by the proposer to the other party in the manner prescribed by 28-2-501 and 28-2-502 before his acceptance has been communicated to the former;

(2) the lapse of the time prescribed in such proposal for its acceptance or, if no time is so prescribed, the lapse of a reasonable time without communication of the acceptance;

(3) the failure of the acceptor to fulfill a condition precedent to acceptance; or

(4) the death or serious mental illness of the proposer.

History: En. Sec. 2132, Civ. C. 1895; re-en. Sec. 4993, Rev. C. 1907; re-en. Sec. 7495, R.C.M. 1921; Cal. Civ. C. Sec. 1587; Field Civ. C. Sec. 772; re-en. Sec. 7495, R.C.M. 1935; R.C.M. 1947, 13-323; amd. Sec. 18, Ch. 117, L. 1979.

Part 6

Object of a Contract

28-2-601. Object of contract defined. The object of a contract is the thing which it is agreed on the part of the party receiving the consideration to do or not to do.

History: En. Sec. 2150, Civ. C. 1895; re-en. Sec. 4996, Rev. C. 1907; re-en. Sec. 7498, R.C.M. 1921; Cal. Civ. C. Sec. 1595; Field Civ. C. Sec. 775; re-en. Sec. 7498, R.C.M. 1935; R.C.M. 1947, 13-401.

28-2-602. Essential characteristics of object. The object of the contract must be lawful when the contract is made and possible and ascertainable by the time the contract is to be performed. Everything is deemed possible except that which is impossible in the nature of things.

History: En. Secs. 2151, 2152, Civ. C. 1895; re-en. Secs. 4997, 4998, Rev. C. 1907; re-en. Secs. 7499, 7500, R.C.M. 1921; Cal. Civ. C. Secs. 1596, 1597; Field Civ. C. Secs. 776, 777; re-en. Secs. 7499, 7500, R.C.M. 1935; R.C.M. 1947, 13-402, 13-403.

28-2-603. When contract wholly void. Where a contract has but a ingle object and such object is unlawful, whether in whole or in part, or holly impossible of performance or so vaguely expressed as to be wholly nascertainable, the entire contract is void.

History: En. Sec. 2153, Civ. C. 1895; re-en. Sec. 4999, Rev. C. 1907; re-en. Sec. 7501, R.C.M. 21; Cal. Civ. C. Sec. 1598; Field Civ. C. Sec. 778; re-en. Sec. 7501, R.C.M. 1935; R.C.M. 1947, -404.

28-2-604. When contract partially void. Where a contract has everal distinct objects of which one at least is lawful and one at least is nlawful, in whole or in part, the contract is void as to the latter and valid s to the rest.

History: En. Sec. 2154, Civ. C. 1895; re-en. Sec. 5000, Rev. C. 1907; re-en. Sec. 7502, R.C.M. 21; Cal. Civ. C. Sec. 1599; Field Civ. C. Sec. 779; re-en. Sec. 7502, R.C.M. 1935; R.C.M. 1947, -405.

Part 7

Illegal Objects and Provisions

28-2-701. What is unlawful. That is not lawful which is:

(1) contrary to an express provision of law;

(2) contrary to the policy of express law, though not expressly prohibited; r

(3) otherwise contrary to good morals.

History: En. Sec. 2240, Civ. C. 1895; re-en. Sec. 5051, Rev. C. 1907; re-en. Sec. 7553, R.C.M. 21; Cal. Civ. C. Sec. 1667; Field Civ. C. Sec. 827; re-en. Sec. 7553, R.C.M. 1935; R.C.M. 1947, -801.

28-2-702. Contracts which violate policy of the law — exemp-ion from responsibility. All contracts which have for their object, irectly or indirectly, to exempt anyone from responsibility for his own fraud, r willful injury to the person or property of another, or for violation of law, hether willful or negligent, are against the policy of the law.

History: En. Sec. 2241, Civ. C. 1895; re-en. Sec. 5052, Rev. C. 1907; re-en. Sec. 7554, R.C.M. 21; Cal. Civ. C. Sec. 1668; Field Civ. C. Sec. 828; re-en. Sec. 7554, R.C.M. 1935; R.C.M. 1947, -802.

28-2-703. Contracts in restraint of trade generally void. Any ntract by which anyone is restrained from exercising a lawful profession, ade, or business of any kind, otherwise than is provided for by 28-2-704 or -2-705, is to that extent void.

History: En. Sec. 2246, Civ. C. 1895; re-en. Sec. 5057, Rev. C. 1907; re-en. Sec. 7559, R.C.M. 21; Cal. Civ. C. Sec. 1673; Field Civ. C. Sec. 833; re-en. Sec. 7559, R.C.M. 1935; R.C.M. 1947, -807.

28-2-704. Exception — sale of goodwill of business. One who sells e goodwill of a business may agree with the buyer to refrain from carrying a similar business within a specified county, city, or part thereof so long the buyer or any person deriving title to the goodwill from him carries on like business therein.

History: En. Sec. 2247, Civ. C. 1895; re-en. Sec. 5058, Rev. C. 1907; re-en. Sec. 7560, R.C.M. 21; Cal. Civ. C. Sec. 1674; Field Civ. C. Sec. 834; re-en. Sec. 7560, R.C.M. 1935; R.C.M. 1947, -808.

28-2-705. Exception — dissolution of partnership. Partners may upon or in anticipation of a dissolution of the partnership, agree that none of them will carry on a similar business within the same city or town where the partnership business has been transacted or within a specified part thereof.

History: En. Sec. 2248, Civ. C. 1895; re-en. Sec. 5059, Rev. C. 1907; re-en. Sec. 7561, R.C.M. 1921; Cal. Civ. C. Sec. 1675; Field Civ. C. Sec. 835; re-en. Sec. 7561, R.C.M. 1935; R.C.M. 1947 13-809.

28-2-706. Contracts in restraint of marriage generally void Every contract in restraint of the marriage of any person other than a minor is void.

History: En. Sec. 2249, Civ. C. 1895; re-en. Sec. 5060, Rev. C. 1907; re-en. Sec. 7562, R.C.M 1921; Cal. Civ. C. Sec. 1676; Field Civ. C. Sec. 836; re-en. Sec. 7562, R.C.M. 1935; R.C.M. 1947 13-810.

28-2-707. What conditions void. A condition in a contract the fulfillment of which is impossible or unlawful within the meaning of part 6 and this part or which is repugnant to the nature of the interest created by the contract is void.

History: En. Sec. 1957, Civ. C. 1895; re-en. Sec. 4905, Rev. C. 1907; re-en. Sec. 7407, R.C.M. 1921; Cal. Civ. C. Sec. 1441; Field Civ. C. Sec. 683; re-en. Sec. 7407, R.C.M. 1935; R.C.M. 1947, 58-211; amd. Sec. 19, Ch. 117, L. 1979.

28-2-708. Restraints upon legal proceedings void. Every stipulation or condition in a contract by which any party thereto is restricted from enforcing his rights under the contract by the usual proceedings in the ordinary tribunals or which limits the time within which he may thus enforce his rights is void.

History: En. Sec. 2245, Civ. C. 1895; re-en. Sec. 5056, Rev. C. 1907; re-en. Sec. 7558, R.C.M. 1921; Field Civ. C. Sec. 832; re-en. Sec. 7558, R.C.M. 1935; R.C.M. 1947, 13-806.

28-2-709. Illegality of agreement to allow another person to confess judgment, accept service of process, or accept default. (1) No contract in writing by which any promise to pay money is created shall contain any provision either empowering any person to enter judgment by confession against any party to the contract or empowering any person as the agent of any party to the contract to either confess judgment, accept service of process, or consent on behalf of such party to the entry of his default in any proceeding in court upon such contract. Every such provision in any such contract shall be illegal and void and shall be unenforceable in the courts of this state against any party to such contract.

(2) The term "contract", as used in this section, shall include all writings executed contemporaneously with and constituting a part of the same transaction, whether such writings be negotiable or nonnegotiable in form.

History: En. Sec. 1, Ch. 197, L. 1935; re-en. Sec. 7562.1, R.C.M. 1935; R.C.M. 1947, 13-811.

28-2-710 through 28-2-720 reserved.

28-2-721. When provision fixing liquidated damages valid. (1) Every contract by which the amount of damage to be paid or other compensation to be made for a breach of an obligation is determined in anticipation thereof is to that extent void, except as expressly provided in subsection (2).

(2) The parties to a contract may agree therein upon an amount which hall be presumed to be an amount of damage sustained by a breach thereof hen, from the nature of the case, it would be impracticable or extremely ifficult to fix the actual damage.

History: En. Secs. 2243, 2244, Civ. C. 1895; re-en. Secs. 5054, 5055, Rev. C. 1907; re-en. Secs. 56, 7557, R.C.M. 1921; Cal. Civ. C. Secs. 1670, 1671; Field Civ. C. Secs. 830, 831; re-en. Secs. 56, 7557, R.C.M. 1935; R.C.M. 1947, 13-804, 13-805.

28-2-722. Contracts for personal services limited to two years. contract to render personal services cannot be enforced against the nployee beyond the term of 2 years from the commencement of service nder it, but if the employee voluntarily continues his service under it eyond that time, the contract may be referred to as affording a presumptive easure of the compensation.

History: En. Sec. 2675, Civ. C. 1895; re-en. Sec. 5258, Rev. C. 1907; re-en. Sec. 7773, R.C.M. 21; Cal. Civ. C. Sec. 1980; Field Civ. C. Sec. 1013; re-en. Sec. 7773, R.C.M. 1935; R.C.M. 1947, -206; amd. Sec. 20, Ch. 117, L. 1979.

Part 8

Consideration

28-2-801. What constitutes good consideration. Any benefit conrred or agreed to be conferred upon the promisor by any other person, to hich the promisor is not lawfully entitled, or any prejudice suffered or greed to be suffered by such person, other than such as he is at the time consent lawfully bound to suffer, as an inducement to the promisor is a ood consideration for a promise.

History: En. Sec. 2160, Civ. C. 1895; re-en. Sec. 5001, Rev. C. 1907; re-en. Sec. 7503, R.C.M. 21; Cal. Civ. C. Sec. 1605; Field Civ. C. Sec. 780; re-en. Sec. 7503, R.C.M. 1935; R.C.M. 1947, -501.

28-2-802. Extent to which existing legal or moral obligation is ood consideration. An existing legal obligation resting upon the promisor, moral obligation originating in some benefit conferred upon the promisor, prejudice suffered by the promisee is also a good consideration for a prome to an extent corresponding with the extent of the obligation, but no furer or otherwise.

History: En. Sec. 2161, Civ. C. 1895; re-en. Sec. 5002, Rev. C. 1907; re-en. Sec. 7504, R.C.M. 21; Cal. Civ. C. Sec. 1606; Field Civ. C. Sec. 781; re-en. Sec. 7504, R.C.M. 1935; R.C.M. 1947, -502.

28-2-803. Consideration to be lawful — effect of illegality. The nsideration of a contract must be lawful within the meaning of 28-2-701. any part of a single consideration for one or more objects or of several conderations for a single object is unlawful, the entire contract is void.

History: En. Secs. 2162, 2163, Civ. C. 1895; re-en. Secs. 5003, 5004, Rev. C. 1907; re-en. Secs. 05, 7506, R.C.M. 1921; Cal. Civ. C. Secs. 1607, 1608; Field Civ. C. Secs. 782, 783; re-en. Sec. 7505, 06, R.C.M. 1935; R.C.M. 1947, 13-503, 13-504.

28-2-804. Written instrument presumptive evidence of considration. A written instrument is presumptive evidence of a consideration.

History: En. Sec. 2169, Civ. C. 1895; re-en. Sec. 5010, Rev. C. 1907; re-en. Sec. 7512, R.C.M. 21; Cal. Civ. C. Sec. 1614; re-en. Sec. 7512, R.C.M. 1935; R.C.M. 1947, 13-510.

28-2-805. Burden of proof of want of consideration. The burden of showing a want of consideration sufficient to support an instrument lies with the party seeking to invalidate or avoid it.

History: En. Sec. 2170, Civ. C. 1895; re-en. Sec. 5011, Rev. C. 1907; re-en. Sec. 7513, R.C.M. 1921; Cal. Civ. C. Sec. 1615; re-en. Sec. 7513, R.C.M. 1935; R.C.M. 1947, 13-511.

28-2-806 through 28-2-810 reserved.

28-2-811. Applicability of rules concerning object to executory consideration. A consideration may be executed or executory, in whole or in part. Insofar as it is executory, it is subject to the provisions of part 6 of this chapter.

History: En. Sec. 2164, Civ. C. 1895; re-en. Sec. 5005, Rev. C. 1907; re-en. Sec. 7507, R.C.M. 1921; Cal. Civ. C. Sec. 1609; Field Civ. C. Sec. 784; re-en. Sec. 7507, R.C.M. 1935; R.C.M. 1947, 13-505.

28-2-812. How amount of executory consideration may be determined. When a consideration is executory, it is not indispensable that the contract should specify its amount or the means of ascertaining it. It may be left to the decision of a third person or regulated by any specified standard.

History: En. Sec. 2165, Civ. C. 1895; re-en. Sec. 5006, Rev. C. 1907; re-en. Sec. 7508, R.C.M. 1921; Cal. Civ. C. Sec. 1610; Field Civ. C. Sec. 785; re-en. Sec. 7508, R.C.M. 1935; R.C.M. 1947, 13-506.

28-2-813. Determination by interested party. When a contract does not determine the amount of the consideration or the method by which it is to be ascertained or when it leaves the amount thereof to the discretion of an interested party, the consideration must be so much money as the object of the contract is reasonably worth.

History: En. Sec. 2166, Civ. C. 1895; re-en. Sec. 5007, Rev. C. 1907; re-en. Sec. 7509, R.C.M. 1921; Cal. Civ. C. Sec. 1611; Field Civ. C. Sec. 786; re-en. Sec. 7509, R.C.M. 1935; R.C.M. 1947, 13-507.

28-2-814. Effect of impossibility of designated exclusive method of determination. (1) Where a contract provides an exclusive method by which its consideration is to be ascertained, which method is on its face impossible of execution, the entire contract is void.

(2) Where a contract provides an exclusive method by which its consideration is to be ascertained, which method appears possible on its face but in fact is or becomes impossible of execution, such provision only is void.

History: En. Secs. 2167, 2168, Civ. C. 1895; re-en. Secs. 5008, 5009, Rev. C. 1907; re-en. Secs. 7510, 7511, R.C.M. 1921; Cal. Civ. C. Secs. 1612, 1613; Field Civ. C. Secs. 787, 788; re-en. Secs. 7510, 7511, R.C.M. 1935; R.C.M. 1947, 13-508, 13-509.

Part 9

Written Contracts

28-2-901. When contracts may be oral. All contracts may be oral except such as are specially required by statute to be in writing.

History: En. Sec. 2183, Civ. C. 1895; re-en. Sec. 5015, Rev. C. 1907; re-en. Sec. 7517, R.C.M. 1921; Cal. Civ. C. Sec. 1622; Field Civ. C. Sec. 792; re-en. Sec. 7517, R.C.M. 1935; R.C.M. 1947, 13-604.

**28-2-902. Enforcement of contract not in writing through
aud.** Where a contract which is required by law to be in writing is pre-
nted from being put into writing by the fraud of a party thereto, any other
rty who is by such fraud led to believe that it is in writing and acts upon
ch belief to his prejudice may enforce it against the fraudulent party.

History: En. Sec. 2184, Civ. C. 1895; re-en. Sec. 5016, Rev. C. 1907; re-en. Sec. 7518, R.C.M.
21; Cal. Civ. C. Sec. 1623; Field Civ. C. Sec. 793; re-en. Sec. 7518, R.C.M. 1935; R.C.M. 1947,
-605.

28-2-903. What contracts must be in writing. (1) The following
reements are invalid unless the same or some note or memorandum thereof
in writing and subscribed by the party to be charged or his agent:

(a) an agreement that by its terms is not to be performed within a year
om the making thereof;

(b) a special promise to answer for the debt, default, or miscarriage of
other, except in the cases provided for in 28-11-105;

(c) an agreement made upon consideration of marriage other than a
utual promise to marry;

(d) an agreement for the leasing for a longer period than 1 year or for the
le of real property or of an interest therein. Such agreement, if made by
agent of the party sought to be charged, is invalid unless the authority
the agent is in writing and subscribed by the party sought to be charged.

(e) an agreement authorizing or employing an agent or broker to purchase
sell real estate for compensation or a commission.

(2) Evidence of an agreement described in (a) through (d) of subsection
) is not admissible without the writing or secondary evidence of its con-
nts.

(3) No evidence is admissible to charge a person upon a representation as
the credit of a third person unless such representation or some memo-
ndum thereof is in writing and either subscribed by or in the handwriting
the party to be charged.

(4) Subsections (1) and (2) do not apply to agreements subject to the
iform Commercial Code.

History: (1)Subds. a to c; en. Secs. 12 to 14, p. 494, Bannack Stat.; re-en. Secs. 12 to 14, pp. 393,
4, Cod. Stat. 1871; re-en. Secs. 166 to 168, 5th Div. Rev. Stat. 1879; re-en. Secs. 223 to 225, 5th
. Comp. Stat. 1887; amd. Sec. 2185, Civ. C. 1895; re-en. Sec. 5017, Rev. C. 1907; Subd. d; en. Sec.
p. 493, Bannack Stat.; re-en. Sec. 8, p. 393, Cod. Stat. 1871; re-en. Sec. 162, 5th Div. Rev. Stat.
79; re-en. Sec. 219, 5th Div. Comp. Stat. 1887; amd. Sec. 2185, Civ. C. 1895; re-en. Sec. 5017, Rev.
1907; Subd. e; en. Sec. 2185, Civ. C. 1895; re-en. Sec. 5017, Rev. C. 1907; all subdivisions re-en.
. 7519, R.C.M. 1921; Cal. Civ. C. Sec. 1624; re-en. Sec. 7519, R.C.M. 1935; amd. Sec. 11-110,
264, L. 1963; Sec. 13-606, R.C.M. 1947; (2), (4)En. Sec. 3276, C. Civ. Proc. 1895; re-en. Sec.
9, Rev. C. 1907; re-en. Sec. 10613, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1973; re-en. Sec. 10613,
.M. 1935; amd. Sec. 11-171, Ch. 264, L. 1963; Sec. 93-1401-7, R.C.M. 1947; (3)En. Sec. 3277,
Civ. Proc. 1895; re-en. Sec. 7970, Rev. C. 1907; re-en. Sec. 10614, R.C.M. 1921; Cal. C. Civ. Proc.
. 1974; re-en. Sec. 10614, R.C.M. 1935; Sec. 93-1401-8, R.C.M. 1947; R.C.M. 1947, 13-606,
1401-7, 93-1401-8; amd. Sec. 21, Ch. 117, L. 1979.

28-2-904. Effect of written contract on oral agreements. The
ecution of a contract in writing, whether the law requires it to be written
not, supersedes all the oral negotiations or stipulations concerning its mat-
which preceded or accompanied the execution of the instrument.

History: En. Sec. 2186, Civ. C. 1895; re-en. Sec. 5018, Rev. C. 1907; re-en. Sec. 7520, R.C.M.
1; Cal. Civ. C. Sec. 1625; Field Civ. C. Sec. 795; re-en. Sec. 7520, R.C.M. 1935; R.C.M. 1947,
607.

28-2-905. When extrinsic evidence concerning a written agreement may be considered. (1) Whenever the terms of an agreement hav been reduced to writing by the parties, it is to be considered as containin all those terms. Therefore, there can be between the parties and thei representives or successors in interest no evidence of the terms of the agreement other than the contents of the writing except in the following cases:

(a) when a mistake or imperfection of the writing is put in issue by th pleadings;

(b) when the validity of the agreement is the fact in dispute.

(2) This section does not exclude other evidence of the circumstance under which the agreement was made or to which it relates, as described i 1-4-102, or other evidence to explain an extrinsic ambiguity or to establis illegality or fraud.

(3) The term "agreement", for the purposes of this section, includes deed and wills as well as contracts between parties.

History: En. Sec. 610, p. 198, L. 1877; re-en. Sec. 610, 1st Div. Rev. Stat. 1879; re-en. Sec. 628 1st Div. Comp. Stat. 1887; re-en. Sec. 3132, C. Civ. Proc. 1895; re-en. Sec. 7873, Rev. C. 1907; re-en Sec. 10517, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1856; re-en. Sec. 10517, R.C.M. 1935; R.C.M. 1947 93-401-13; amd. Sec. 22, Ch. 117, L. 1979.

28-2-906. When written contract takes effect. A contract in writing takes effect upon its delivery to the party in whose favor it is made o to his agent.

History: En. Sec. 2187, Civ. C. 1895; re-en. Sec. 5019, Rev. C. 1907; re-en. Sec. 7521, R.C.M 1921; Cal. Civ. C. Sec. 1626; Field Civ. C. Sec. 796; re-en. Sec. 7521, R.C.M. 1935; R.C.M. 1947 13-608.

28-2-907. Applicability of rules concerning transfers in general. The provisions of Title 70, chapter 1, part 5, and 70-20-110 concerning the delivery of grants, absolute and conditional, apply to all written contracts.

History: En. Sec. 2188, Civ. C. 1895; re-en. Sec. 5020, Rev. C. 1907; re-en. Sec. 7522, R.C.M. 1921; Cal. Civ. C. Sec. 1627; Field Civ. C. Sec. 797; re-en. Sec. 7522, R.C.M. 1935; R.C.M. 1947, 13-609.

Parts 10 through 14 reserved

Part 15

Enforcement of Contracts

28-2-1501. When successive actions on same contract permitted. Successive actions may be maintained upon the same contract or transaction whenever after the former action a new cause of action arises therefrom.

History: En. Sec. 426, p. 130, Bannack Stat.; re-en. Sec. 496, p. 232, L. 1867; re-en. Sec. 20, p 30, Cod. Stat. 1871; rep. Sec. 674, p. 215, L. 1877; re-en. Sec. 1893, C. Civ. Proc. 1895; re-en. Sec. 7186, Rev. C. 1907; re-en. Sec. 9819, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1047; re-en. Sec. 9819, R.C.M. 1935; R.C.M. 1947, 93-8704.

Part 16

Modification of Contracts

28-2-1601. Alteration of oral contract by parties. A contract not writing may be altered in any respect by consent of the parties in writing ithout a new consideration and is extinguished thereby to the extent of the ew alteration.

History: En. Sec. 2280, Civ. C. 1895; re-en. Sec. 5066, Rev. C. 1907; re-en. Sec. 7568, R.C.M. 21; Cal. Civ. C. Sec. 1697; Based on Field Civ. C. Sec. 842; re-en. Sec. 7568, R.C.M. 1935; R.C.M. 47, 13-906.

28-2-1602. How written contract may be altered by parties. A ntract in writing may be altered by a contract in writing or by an executed al agreement, and not otherwise.

History: En. Sec. 2281, Civ. C. 1895; re-en. Sec. 5067, Rev. C. 1907; re-en. Sec. 7569, R.C.M. 21; Cal. Civ. C. Sec. 1698; re-en. Sec. 7569, R.C.M. 1935; R.C.M. 1947, 13-907.

28-2-1603 through 28-2-1610 reserved.

28-2-1611. When written contract may be revised by court. hen, through fraud or a mutual mistake of the parties or a mistake of one rty while the other at the time knew or suspected, a written contract does t truly express the intention of the parties, it may be revised on the application of a party aggrieved so as to express that intention, so far as it can done without prejudice to rights acquired by third persons in good faith d for value.

History: En. Sec. 4430, Civ. C. 1895; re-en. Sec. 6108, Rev. C. 1907; re-en. Sec. 8726, R.C.M. 21; Cal. Civ. C. Sec. 3399; Field Civ. C. Sec. 1899; re-en. Sec. 8726, R.C.M. 1935; R.C.M. 1947, -901.

28-2-1612. Presumption that parties intended equitable agreeent. For the purpose of revising a contract, it must be presumed that all e parties thereto intended to make an equitable and conscientious agreeent.

History: En. Sec. 4431, Civ. C. 1895; re-en. Sec. 6109, Rev. C. 1907; re-en. Sec. 8727, R.C.M. 21; Cal. Civ. C. Sec. 3400; Field Civ. C. Sec. 1900; re-en. Sec. 8727, R.C.M. 1935; R.C.M. 1947, -902.

28-2-1613. Scope of court's inquiry. In revising a written instruent, the court may inquire what the instrument was intended to mean and hat were intended to be its legal consequences and is not confined to the quiry what the language of the instrument was intended to be.

History: En. Sec. 4432, Civ. C. 1895; re-en. Sec. 6110, Rev. C. 1907; re-en. Sec. 8728, R.C.M. 21; Cal. Civ. C. Sec. 3401; Field Civ. C. Sec. 1901; re-en. Sec. 8728, R.C.M. 1935; R.C.M. 1947, -903.

28-2-1614. Specific enforcement of revised contract. A contract ay be first revised and then specifically enforced.

History: En. Sec. 4433, Civ. C. 1895; re-en. Sec. 6111, Rev. C. 1907; re-en. Sec. 8729, R.C.M. 21; Cal. Civ. C. Sec. 3402; Field Civ. C. Sec. 1902; re-en. Sec. 8729, R.C.M. 1935; R.C.M. 1947, -904.

Part 17

Extinction of Contracts — Rescission

28-2-1701. How contract extinguished. (1) A contract may be extinguished in the same manner as any other obligation and also in the manner prescribed by part 16 and this part.

(2) A contract is extinguished by its rescission.

History: (1)En. Sec. 2260, Civ. C. 1895; re-en. Sec. 5061, Rev. C. 1907; re-en. Sec. 7563, R.C.M 1921; Cal. Civ. C. Sec. 1682; re-en. Sec. 7563, R.C.M. 1935; Sec. 13-901, R.C.M. 1947; (2)En. Sec 2270, Civ. C. 1895; re-en. Sec. 5062, Rev. C. 1907; re-en. Sec. 7564, R.C.M. 1921; Cal. Civ. C. Sec 1688; Field Civ. C. Sec. 838; re-en. Sec. 7564, R.C.M. 1935; Sec. 13-902, R.C.M. 1947; R.C.M. 1947 13-901, 13-902; amd. Sec. 23, Ch. 117, L. 1979.

28-2-1702. Extinction of written contract by destruction or cancellation. The destruction or cancellation of a written contract or of the signature of the parties liable thereon with intent to extinguish the obligation thereof extinguishes it as to all the parties consenting to the act.

History: En. Sec. 2282, Civ. C. 1895; re-en. Sec. 5068, Rev. C. 1907; re-en. Sec. 7570, R.C.M 1921; Cal. Civ. C. Sec. 1699; re-en. Sec. 7570, R.C.M. 1935; R.C.M. 1947, 13-908.

28-2-1703. Extinction of executory obligations of contract by destruction, cancellation, or alteration. (1) The intentional destruction cancellation, or material alteration of a written contract by a party entitled to any benefit under it or with his consent extinguishes all the executory obligations of the contract in his favor against parties who do not consent to the act.

(2) Where a contract is executed in duplicate, an alteration or destruction of one copy while the other exists is not within the provisions of subsection (1).

History: En. Secs. 2283, 2284, Civ. C. 1895; re-en. Secs. 5069, 5070, Rev. C. 1907; re-en. Secs 7571, 7572, R.C.M. 1921; Cal. Civ. C. Secs. 1700, 1701; Field Civ. C. Secs. 845, 846; re-en. Secs 7571, 7572, R.C.M. 1935; R.C.M. 1947, 13-909, 13-910.

28-2-1704 through 28-2-1710 reserved.

28-2-1711. When party may rescind. A party to a contract may rescind the same in the following cases only:

(1) if the consent of the party rescinding or of any party jointly contracting with him was given by mistake or obtained through duress, menace, fraud, or undue influence exercised by or with the connivance of the party as to whom he rescinds or of any other party to the contract jointly interested with such party;

(2) if, through the fault of the party as to whom he rescinds, the consideration for his obligation fails in whole or in part;

(3) if such consideration becomes entirely void from any cause;

(4) if such consideration, before it is rendered to him, fails in a material respect from any cause; or

(5) if all the other parties consent.

History: En. Sec. 2271, Civ. C. 1895; re-en. Sec. 5063, Rev. C. 1907; re-en. Sec. 7565, R.C.M. 1921; Cal. Civ. C. Sec. 1689; Field Civ. C. Sec. 839; re-en. Sec. 7565, R.C.M. 1935; R.C.M. 1947, 13-903; amd. Sec. 24, Ch. 117, L. 1979.

28-2-1712. When stipulation against rescission ineffective. A stipulation that errors of description shall not avoid a contract or shall be the bject of compensation, or both, does not take away the right of rescission r fraud or for mistake where such mistake is in a matter essential to the ducement of the contract and is not capable of exact and entire compensaon.

History: En. Sec. 2272, Civ. C. 1895; re-en. Sec. 5064, Rev. C. 1907; re-en. Sec. 7566, R.C.M. 21; Cal. Civ. C. Sec. 1690; Field Civ. C. Sec. 840; re-en. Sec. 7566, R.C.M. 1935; R.C.M. 1947, -904.

28-2-1713. How rescission accomplished. Rescission, when not fected by consent, can be accomplished only by the use on the part of the rty rescinding of reasonable diligence to comply with the following rules:

(1) He must rescind promptly upon discovering the facts which entitle m to rescind if he is free from duress, menace, undue influence, or disabily and is aware of his right to rescind.

(2) He must restore to the other party everything of value which he has ceived from him under the contract or must offer to restore the same, upon ndition that such party shall do likewise, unless the latter is unable or sitively refuses to do so.

History: En. Sec. 2273, Civ. C. 1895; re-en. Sec. 5065, Rev. C. 1907; re-en. Sec. 7567, R.C.M. 21; Cal. Civ. C. Sec. 1691; Field Civ. C. Sec. 841; re-en. Sec. 7567, R.C.M. 1935; R.C.M. 1947, -905.

28-2-1714. When rescission may be adjudged. The rescission of a itten contract may be adjudged on the application of a party aggrieved:

(1) in any of the cases mentioned in 28-2-1711;

(2) where the contract is unlawful for causes not apparent upon its face d the parties were not equally in fault; or

(3) when the public interest will be prejudiced by permitting it to stand.

History: En. Sec. 4440, Civ. C. 1895; re-en. Sec. 6112, Rev. C. 1907; re-en. Sec. 8730, R.C.M. 21; Cal. Civ. C. Sec. 3406; Field Civ. C. Sec. 1903; re-en. Sec. 8730, R.C.M. 1935; R.C.M. 1947, -905.

28-2-1715. When rescission may be adjudged for mistake. escission cannot be adjudged for mere mistake unless the party against hom it is adjudged can be restored to substantially the same position as if e contract had not been made.

History: En. Sec. 4441, Civ. C. 1895; re-en. Sec. 6113, Rev. C. 1907; re-en. Sec. 8731, R.C.M. 21; Cal. Civ. C. Sec. 3407; Field Civ. C. Sec. 1904; re-en. Sec. 8731, R.C.M. 1935; R.C.M. 1947, -906.

28-2-1716. Power of court to require party rescinding to do quity. On adjudging the rescission of a contract, the court may require the rty to whom such relief is granted to make any compensation or restoraon to the other which justice may require.

History: En. Sec. 4442, Civ. C. 1895; re-en. Sec. 6114, Rev. C. 1907; re-en. Sec. 8732, R.C.M. 21; Cal. Civ. C. Sec. 3408; Field Civ. C. Sec. 1905; re-en. Sec. 8732, R.C.M. 1935; R.C.M. 1947, 907.

CHAPTER 3

INTERPRETATION OF CONTRACTS

Part 1 — General Provisions

ction
3-101. Rules of interpretation to be uniform.
3-102. What law and usage to govern interpretation.

Part 2 — General Rules of Interpretation

28-3-201. Interpretation giving effect to contract favored.
28-3-202. Effect to be given to every part of contract.
28-3-203. When several contracts taken together.
28-3-204. How repugnancies reconciled.
28-3-205. Written or original terms to control printed terms.
28-3-206. Uncertainty to be resolved against party causing it.

Part 3 — Intention of the Parties

28-3-301. Interpretation to give effect to mutual intention.
28-3-302. How intention ascertained.
28-3-303. Writing generally to determine intention.
28-3-304. When writing disregarded.
28-3-305. Contract restricted to its apparent objects.
28-3-306. Interpretation of terms that are ambiguous or were intended in a different sense b different parties.
28-3-307. Particular clauses subordinate to general intent.

Part 4 — Factors Considered in Determining Intention

28-3-401. Extent to which language governs interpretation.
28-3-402. Reference to circumstances permissible.
28-3-403. Evidence of usage to clarify.

Part 5 — Interpretation of Words

28-3-501. Words generally understood in their ordinary sense.
28-3-502. Interpretation of technical words.
28-3-503. Inconsistent words to be rejected.

Part 6 — Time of Performance

28-3-601. Time of performance when not specified.
28-3-602. When time considered of the essence.
28-3-603. Postponement of performance date which falls on holiday.

Part 7 — Provisions Implied by Law

28-3-701. Stipulations necessary for reasonableness or conformity to usage.
28-3-702. Necessary and incidental terms.
28-3-703. When promise presumed to be joint and several.
28-3-704. Contractual right to attorney fees treated as reciprocal.

Part 1

General Provisions

28-3-101. Rules of interpretation to be uniform. All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this code.

History: En. Sec. 2200, Civ. C. 1895; re-en. Sec. 5024, Rev. C. 1907; re-en. Sec. 7526, R.C.M. 1921; Cal. Civ. C. Sec. 1635; Field Civ. C. Sec. 800; re-en. Sec. 7526, R.C.M. 1935; R.C.M. 1947, 13-701.

28-3-102. What law and usage to govern interpretation. A contract is to be interpreted according to the law and usage of the place where is to be performed or, if it does not indicate a place of performance, cording to the law and usage of the place where it is made.

History: En. Sec. 2211, Civ. C. 1895; re-en. Sec. 5035, Rev. C. 1907; re-en. Sec. 7537, R.C.M. 21; Cal. Civ. C. Sec. 1646; Field Civ. C. Sec. 811; re-en. Sec. 7537, R.C.M. 1935; R.C.M. 1947, -712.

Part 2

General Rules of Interpretation

28-3-201. Interpretation giving effect to contract favored. A ntract must receive such an interpretation as will make it lawful, operative, finite, reasonable, and capable of being carried into effect if it can be done ithout violating the intention of the parties.

History: En. Sec. 2208, Civ. C. 1895; re-en. Sec. 5032, Rev. C. 1907; re-en. Sec. 7534, R.C.M. 21; Cal. Civ. C. Sec. 1643; Field Civ. C. Sec. 808; re-en. Sec. 7534, R.C.M. 1935; R.C.M. 1947, -709.

28-3-202. Effect to be given to every part of contract. The whole a contract is to be taken together so as to give effect to every part if asonably practicable, each clause helping to interpret the other.

History: En. Sec. 2206, Civ. C. 1895; re-en. Sec. 5030, Rev. C. 1907; re-en. Sec. 7532, R.C.M. 21; Cal. Civ. C. Sec. 1641; Field Civ. C. Sec. 806; re-en. Sec. 7532, R.C.M. 1935; R.C.M. 1947, -707.

28-3-203. When several contracts taken together. Several conacts relating to the same matters, between the same parties, and made as rts of substantially one transaction are to be taken together.

History: En. Sec. 2207, Civ. C. 1895; re-en. Sec. 5031, Rev. C. 1907; re-en. Sec. 7533, R.C.M. 21; Cal. Civ. C. Sec. 1642; Field Civ. C. Sec. 807; re-en. Sec. 7533, R.C.M. 1935; R.C.M. 1947, 708.

28-3-204. How repugnancies reconciled. Repugnancies in a conact must be reconciled, if possible, by such an interpretation as will give me effect to the repugnant clauses, subordinate to the general intent and rpose of the whole contract.

History: En. Sec. 2217, Civ. C. 1895; re-en. Sec. 5041, Rev. C. 1907; re-en. Sec. 7543, R.C.M. 21; Cal. Civ. C. Sec. 1652; Field Civ. C. Sec. 817; re-en. Sec. 7543, R.C.M. 1935; R.C.M. 1947, 718.

28-3-205. Written or original terms to control printed terms. here a contract is partly written and partly printed or where part of it is itten or printed under the special directions of the parties and with a spel view to their intention and the remainder is copied from a form origlly prepared without special reference to the particular parties and the rticular contract in question, the written parts control the printed parts d the parts which are purely original control those which are copied from orm and, if the two are absolutely repugnant, the latter must be so far disarded.

History: En. Sec. 2216, Civ. C. 1895; re-en. Sec. 5040, Rev. C. 1907; re-en. Sec. 7542, R.C.M. 1; Cal. Civ. C. Sec. 1651; Field Civ. C. Sec. 816; re-en. Sec. 7542, R.C.M. 1935; R.C.M. 1947, 717.

28-3-206. Uncertainty to be resolved against party causing it. cases of uncertainty not removed by parts 1 through 5 of this chapter, the language of a contract should be interpreted most strongly against the part who caused the uncertainty to exist. The promisor is presumed to be suc party, except that in the case of a contract between a public officer or bod as such, and a private party, it is presumed that all uncertainty was cause by the private party.

History: En. Sec. 2219, Civ. C. 1895; re-en. Sec. 5043, Rev. C. 1907; re-en. Sec. 7545, R.C.M 1921; Cal. Civ. C. Sec. 1654; Field Civ. C. Sec. 819; re-en. Sec. 7545, R.C.M. 1935; R.C.M. 194 13-720; amd. Sec. 25, Ch. 117, L. 1979.

Part 3

Intention of the Parties

28-3-301. Interpretation to give effect to mutual intention. contract must be so interpreted as to give effect to the mutual intention o the parties as it existed at the time of contracting, so far as the same i ascertainable and lawful.

History: En. Sec. 2201, Civ. C. 1895; re-en. Sec. 5025, Rev. C. 1907; re-en. Sec. 7527, R.C.M 1921; Cal. Civ. C. Sec. 1636; Field Civ. C. Sec. 801; re-en. Sec. 7527, R.C.M. 1935; R.C.M. 194 13-702.

28-3-302. How intention ascertained. For the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rule given in this chapter are to be applied.

History: En. Sec. 2202, Civ. C. 1895; re-en. Sec. 5026, Rev. C. 1907; re-en. Sec. 7528, R.C.M 1921; Cal. Civ. C. Sec. 1637; Field Civ. C. Sec. 802; re-en. Sec. 7528, R.C.M. 1935; R.C.M. 194 13-703.

28-3-303. Writing generally to determine intention. When a contract is reduced to writing, the intention of the parties is to be ascertaine from the writing alone if possible, subject, however, to the other provision of this chapter.

History: En. Sec. 2204, Civ. C. 1895; re-en. Sec. 5028, Rev. C. 1907; re-en. Sec. 7530, R.C.M 1921; Cal. Civ. C. Sec. 1639; Field Civ. C. Sec. 804; re-en. Sec. 7530, R.C.M. 1935; R.C.M. 194 13-705.

28-3-304. When writing disregarded. When through fraud, mistake or accident a written contract fails to express the real intention of the parties, such intention is to be regarded and the erroneous parts of the writin disregarded.

History: En. Sec. 2205, Civ. C. 1895; re-en. Sec. 5029, Rev. C. 1907; re-en. Sec. 7531, R.C.M 1921; Cal. Civ. C. Sec. 1640; Field Civ. C. Sec. 805; re-en. Sec. 7531, R.C.M. 1935; R.C.M. 194 13-706.

28-3-305. Contract restricted to its apparent objects. Howeve broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.

History: En. Sec. 2213, Civ. C. 1895; re-en. Sec. 5037, Rev. C. 1907; re-en. Sec. 7539, R.C.M 1921; Cal. Civ. C. Sec. 1648; Field Civ. C. Sec. 813; re-en. Sec. 7539, R.C.M. 1935; R.C.M. 194 13-714.

28-3-306. Interpretation of terms that are ambiguous or wer intended in a different sense by different parties. (1) If the terms o a promise are in any respect ambiguous or uncertain, it must be interprete n the sense in which the promisor believed, at the time of making it, that he promisee understood it.

(2) When the terms of an agreement have been intended in a different ense by different parties to it, that sense is to prevail against either party n which he supposed the other understood it; and when different construc- ons of a provision are otherwise equally proper, that is to be taken which most favorable to the party in whose favor the provision was made.

History: (1)En. Sec. 2214, Civ. C. 1895; re-en. Sec. 5038, Rev. C. 1907; re-en. Sec. 7540, R.C.M. 921; Cal. Civ. C. Sec. 1649; Field Civ. C. Sec. 814; re-en. Sec. 7540, R.C.M. 1935; Sec. 13-715, .C.M. 1947; (2)En. Sec. 618, p. 200, L. 1877; re-en. Sec. 618, 1st Div. Rev. Stat. 1879; re-en. Sec. 6, 1st Div. Comp. Stat. 1887; re-en. Sec. 3140, C. Civ. Proc. 1895; re-en. Sec. 7881, Rev. C. 1907; -en. Sec. 10525, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1864; re-en. Sec. 10525, R.C.M. 1935; Sec. -401-21, R.C.M. 1947; R.C.M. 1947, 13-715, 93-401-21.

28-3-307. Particular clauses subordinate to general intent. Par- cular clauses of a contract are subordinate to its general intent.

History: En. Sec. 2215, Civ. C. 1895; re-en. Sec. 5039, Rev. C. 1907; re-en. Sec. 7541, R.C.M. 21; Cal. Civ. C. Sec. 1650; Field Civ. C. Sec. 815; re-en. Sec. 7541, R.C.M. 1935; R.C.M. 1947, -716.

Part 4

Factors Considered in Determining Intention

28-3-401. Extent to which language governs interpretation. The nguage of a contract is to govern its interpretation if the language is clear d explicit and does not involve an absurdity.

History: En. Sec. 2203, Civ. C. 1895; re-en. Sec. 5027, Rev. C. 1907; re-en. Sec. 7529, R.C.M. 21; Cal. Civ. C. Sec. 1638; Field Civ. C. Sec. 803; re-en. Sec. 7529, R.C.M. 1935; R.C.M. 1947, -704.

28-3-402. Reference to circumstances permissible. A contract ay be explained by reference to the circumstances under which it was made d the matter to which it relates.

History: En. Sec. 2212, Civ. C. 1895; re-en. Sec. 5036, Rev. C. 1907; re-en. Sec. 7538, R.C.M. 21; Cal. Civ. C. Sec. 1647; Field Civ. C. Sec. 812; re-en. Sec. 7538, R.C.M. 1935; R.C.M. 1947, -713.

28-3-403. Evidence of usage to clarify. In conformity with the rules evidence, upon a trial evidence may be given of usage to explain the true aracter of a contract if such true character is not otherwise plain, but usage never admissible except as an instrument of interpretation.

istory: En. Sec. 624, p. 201, L. 1877; re-en. Sec. 624, 1st Div. Rev. Stat. 1879; re-en. Sec. 642, Div. Comp. Stat. 1887; re-en. Sec. 3146, C. Civ. Proc. 1895; re-en. Sec. 7887, Rev. C. 1907; re-en. . 10531, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1870; re-en. Sec. 10531, R.C.M. 1935; R.C.M. 1947, 401-27(part); amd. Sec. 26, Ch. 117, L. 1979.

Part 5

Interpretation of Words

28-3-501. Words generally understood in their ordinary sense. e words of a contract are to be understood in their ordinary and popular se rather than according to their strict legal meaning unless used by the parties in a technical sense or unless a special meaning is given to them b usage, in which case the latter must be followed.

History: En. Sec. 2209, Civ. C. 1895; re-en. Sec. 5033, Rev. C. 1907; re-en. Sec. 7535, R.C.M 1921; Cal. Civ. C. Sec. 1644; Field Civ. C. Sec. 809; re-en. Sec. 7535, R.C.M. 1935; R.C.M. 1947 13-710.

28-3-502. Interpretation of technical words. Technical words ar to be interpreted as usually understood by persons in the profession or business to which they relate unless clearly used in a different sense.

History: En. Sec. 2210, Civ. C. 1895; re-en. Sec. 5034, Rev. C. 1907; re-en. Sec. 7536, R.C.M 1921; Cal. Civ. C. Sec. 1645; Field Civ. C. Sec. 810; re-en. Sec. 7536, R.C.M. 1935; R.C.M. 1947 13-711.

28-3-503. Inconsistent words to be rejected. Words in a contrac which are wholly inconsistent with its nature or with the main intention o the parties are to be rejected.

History: En. Sec. 2218, Civ. C. 1895; re-en. Sec. 5042, Rev. C. 1907; re-en. Sec. 7544, R.C.M 1921; Cal. Civ. C. Sec. 1653; Field Civ. C. Sec. 818; re-en. Sec. 7544, R.C.M. 1935; R.C.M. 1947 13-719.

Part 6

Time of Performance

28-3-601. Time of performance when not specified. If no time i specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantl (for example, if it consists in the payment of money only), it must be performed immediately upon the thing to be done being exactly ascertained.

History: En. Sec. 2222, Civ. C. 1895; re-en. Sec. 5046, Rev. C. 1907; re-en. Sec. 7548, R.C.M 1921; Cal. Civ. C. Sec. 1657; Field Civ. C. Sec. 822; re-en. Sec. 7548, R.C.M. 1935; R.C.M. 1947 13-723.

28-3-602. When time considered of the essence. Time is neve considered as of the essence of a contract unless by its terms expressly s provided.

History: En. Sec. 2223, Civ. C. 1895; re-en. Sec. 5047, Rev. C. 1907; re-en. Sec. 7549, R.C.M 1921; Cal. Civ. C. Sec. 1658; Field Civ. C. Sec. 823; re-en. Sec. 7549, R.C.M. 1935; R.C.M. 1947 13-724.

28-3-603. Postponement of performance date which falls o holiday. Whenever any act of a secular nature other than a work of necessity or mercy is appointed by contract to be performed upon a particular da which day falls upon a holiday, such act may be performed upon the nex business day with the same effect as if it had been performed upon the da appointed.

History: En. Sec. 12, Pol. C. 1895; re-en. Sec. 12, Rev. C. 1907; re-en. Sec. 12, R.C.M. 1921; Ca Pol. C. Sec. 13; re-en. Sec. 12, R.C.M. 1935; R.C.M. 1947, 19-109.

Part 7

Provisions Implied by Law

28-3-701. Stipulations necessary for reasonableness or conformity to usage. Stipulations which are necessary to make a contrac asonable or conformable to usage are implied in respect to matters concern- g which the contract manifests no contrary intention.

History: En. Sec. 2220, Civ. C. 1895; re-en. Sec. 5044, Rev. C. 1907; re-en. Sec. 7546, R.C.M. 21; Cal. Civ. C. Sec. 1655; Field Civ. C. Sec. 820; re-en. Sec. 7546, R.C.M. 1935; R.C.M. 1947, -721.

28-3-702. Necessary and incidental terms. All things that in law or age are considered as incidental to a contract or as necessary to carry it to effect are implied therefrom unless some of them are expressly men- oned therein, in which case all other things of the same class are considered be excluded.

History: En. Sec. 2221, Civ. C. 1895; re-en. Sec. 5045, Rev. C. 1907; re-en. Sec. 7547, R.C.M. 21; Cal. Civ. C. Sec. 1656; Field Civ. C. Sec. 821; re-en. Sec. 7547, R.C.M. 1935; R.C.M. 1947, -722; amd. Sec. 27, Ch. 117, L. 1979.

28-3-703. When promise presumed to be joint and several. (1) here all the parties who unite in a promise receive some benefit from the nsideration, whether past or present, their promise is presumed to be joint d several.

(2) A promise made in the singular number but executed by several per- ns is presumed to be joint and several.

History: En. Secs. 2224, 2225, Civ. C. 1895; re-en. Secs. 5048, 5049, Rev. C. 1907; re-en. Secs. 50, 7551, R.C.M. 1921; Cal. Civ. C. Secs. 1659, 1660; Field Civ. C. Secs. 824, 825; re-en. Secs. 50, 7551, R.C.M. 1935; R.C.M. 1947, 13-725, 13-726.

28-3-704. Contractual right to attorney fees treated as recip- cal. Whenever, by virtue of the provisions of any contract or obligation in e nature of a contract made and entered into at any time after July 1, 71, one party to such contract or obligation has an express right to recover torney fees from any other party to the contract or obligation in the event e party having that right shall bring an action upon the contract or obli- tion, then in any action on such contract or obligation all parties to the ntract or obligation shall be deemed to have the same right to recover torney fees and the prevailing party in any such action, whether by virtue the express contractual right or by virtue of this section, shall be entitled recover his reasonable attorney fees from the losing party or parties.

istory: En. Sec. 1, Ch. 259, L. 1971; R.C.M. 1947, 93-8601.1.

CHAPTERS 4 THROUGH 9

RESERVED

CHAPTER 10

AGENCY

Part 1 — General Provisions

tion

10-101. Definitions of agent and agency.
10-102. General versus special agents.

28-10-103. Actual versus ostensible agency.
28-10-104. Who may appoint an agent, who may be an agent.
28-10-105. What acts agent may perform.

Part 2 — Creation of Agency

28-10-201. How agency may be created.
28-10-202. Consideration unnecessary.
28-10-203. When written authorization necessary.
Sections 28-10-204 through 28-10-210 reserved.
28-10-211. How agent's act ratified.
28-10-212. Ratification of part of indivisible transaction.
28-10-213. Ratification not to prejudice third persons.
28-10-214. When ratification void.
28-10-215. When ratification may be rescinded.

Part 3 — Duties of Agent

28-10-301. Agent not to exceed actual authority.
28-10-302. Duty to keep principal informed.
28-10-303. Duty of agent employed to collect negotiable instrument.

Part 4 — Authority of Agent

28-10-401. What authority agent has.
28-10-402. Actual authority defined.
28-10-403. Ostensible authority defined.
28-10-404. When and as to whom agent's authority restricted.
28-10-405. Implied powers of agent.
28-10-406. Interpretation of authority given partly in general and partly in specific terms.
28-10-407. Statutory exceptions to general authority.
28-10-408. When agent may disobey instructions.
28-10-409. No authority to defraud principal.
Sections 28-10-410 through 28-10-420 reserved.
28-10-421. What included in authority to sell personal property.
28-10-422. What included in authority to sell real property.
28-10-423. Authority of agent to sell to receive price.

Part 5 — Subagents

28-10-501. When agent may delegate powers.
28-10-502. Effect of unauthorized employment of subagent.
28-10-503. Effect of authorized employment of subagent.

Part 6 — Rights and Liabilities of Principal

28-10-601. Accural of rights and liabilities to principal.
28-10-602. Principal's responsibility for agent's negligence, omissions, and wrongs.
28-10-603. When instrument binds principal.
28-10-604. When notice to principal or agent is notice to the other.
28-10-605. Extent to which principal bound when agent exceeds authority.
28-10-606. Extent to which principal bound by acts under ostensible authority.
28-10-607. When principal bound by incomplete execution of authority.
28-10-608. Rights of person who deals with agent without knowledge of agency.
28-10-609. Principal's liability when agent given exclusive credit.

Part 7 — Agent's Responsibility to Third Persons

28-10-701. Warranty of authority.
28-10-702. When agent responsible to third persons as a principal.
28-10-703. Responsibility of agent when third person claims property received for principal.

-10-704. Applicability of laws relating to capacity to contract.

Part 8 — Termination of Agency

-10-801. Circumstances which terminate any agency.
-10-802. Circumstances which terminate agency not coupled with an interest.

Part 1

General Provisions

28-10-101. Definitions of agent and agency. An agent is one who presents another, called the principal, in dealings with third persons. Such presentation is called agency.

istory: En. Sec. 3070, Civ. C. 1895; re-en. Sec. 5413, Rev. C. 1907; re-en. Sec. 7928, R.C.M. 1; Cal. Civ. C. Sec. 2295; Field Civ. C. Sec. 1216; re-en. Sec. 7928, R.C.M. 1935; R.C.M. 1947, 01.

28-10-102. General versus special agents. An agent for a partic- r act or transaction is called a special agent. All others are general agents.

istory: En. Sec. 3072, Civ. C. 1895; re-en. Sec. 5415, Rev. C. 1907; re-en. Sec. 7930, R.C.M. 1; Cal. Civ. C. Sec. 2297; Field Civ. C. Sec. 1218; re-en. Sec. 7930, R.C.M. 1935; R.C.M. 1947, 03.

28-10-103. Actual versus ostensible agency. An agency is either ual or ostensible. An agency is actual when the agent is really employed the principal. An agency is ostensible when the principal intentionally or want of ordinary care causes a third person to believe another to be his nt who is not really employed by him.

istory: En. Secs. 3073, 3074, 3075, Civ. C. 1895; re-en. Secs. 5416, 5417, 5418, Rev. C. 1907; n. Secs. 7931, 7932, 7933, R.C.M. 1921; Cal. Civ. C. Secs. 2298, 2299, 2300; Field Civ. C. Secs. 9, 1220, 1221; re-en. Secs. 7931, 7932, 7933, R.C.M. 1935; R.C.M. 1947, 2-104, 2-105, 2-106.

8-10-104. Who may appoint an agent, who may be an agent. y person having capacity to contract, except a minor, may appoint an nt, and any person may be an agent.

istory: En. Secs. 16, 3071, Civ. C. 1895; re-en. Secs. 3590, 5414, Rev. C. 1907; re-en. Secs. 5678,), R.C.M. 1921; Cal. Civ. C. Secs. 33, 2296; Field Civ. C. Secs. 15, 1217; re-en. Secs. 5678, 7929, M. 1935; R.C.M. 1947, 2-102, 64-105; amd. Sec. 28, Ch. 117, L. 1979.

8-10-105. What acts agent may perform. (1) An agent may be horized to do any acts which his principal might do, except those to which latter is bound to give his personal attention.

2) Every act which, according to this code, may be done by or to any son may be done by or to the agent of such person for that purpose unless ontrary intention clearly appears.

istory: En. Secs. 3080, 3081, Civ. C. 1895; re-en. Secs. 5419, 5420, Rev. C. 1907; re-en. Secs. , 7935, R.C.M. 1921; Cal. Civ. C. Secs. 2304, 2305; Field Civ. C. Secs. 1222, 1223; re-en. Secs. , 7935, R.C.M. 1935; R.C.M. 1947, 2-107, 2-108.

Part 2

Creation of Agency

28-10-201. How agency may be created. An agency may be creat and an authority may be conferred by a precedent authorization or a subs quent ratification.

History: En. Sec. 3083, Civ. C. 1895; re-en. Sec. 5422, Rev. C. 1907; re-en. Sec. 7937, R.C. 1921; Cal. Civ. C. Sec. 2307; Field Civ. C. Sec. 1225; re-en. Sec. 7937, R.C.M. 1935; R.C.M. 19 2-114.

28-10-202. Consideration unnecessary. A consideration is n necessary to make an authority, whether precedent or subsequent, bindi upon the principal.

History: En. Sec. 3084, Civ. C. 1895; re-en. Sec. 5423, Rev. C. 1907; re-en. Sec. 7938, R.C. 1921; Cal. Civ. C. Sec. 2308; Field Civ. C. Sec. 1226; re-en. Sec. 7938, R.C.M. 1935; R.C.M. 19 2-115.

28-10-203. When written authorization necessary. An or authorization is sufficient for any purpose, except that an authority to ent into a contract required by law to be in writing can only be given by instrument in writing.

History: En. Sec. 3085, Civ. C. 1895; re-en. Sec. 5424, Rev. C. 1907; re-en. Sec. 7939, R.C. 1921; Cal. Civ. C. Sec. 2309; Based on Field Civ. C. Sec. 1227; re-en. Sec. 7939, R.C.M. 1935; R.C. 1947, 2-116.

28-10-204 through 28-10-210 reserved.

28-10-211. How agent's act ratified. A ratification can be ma only in the manner that would have been necessary to confer an origin authority for the act ratified or, whenever an oral authorization would su fice, by knowingly accepting or retaining the benefit of the act.

History: En. Sec. 3086, Civ. C. 1895; re-en. Sec. 5425, Rev. C. 1907; re-en. Sec. 7940, R.C. 1921; Cal. Civ. C. Sec. 2310; Field Civ. C. Sec. 1228; re-en. Sec. 7940, R.C.M. 1935; R.C.M. 19 2-117; amd. Sec. 29, Ch. 117, L. 1979.

28-10-212. Ratification of part of indivisible transaction. Rati cation of part of an indivisible transaction is a ratification of the whole.

History: En. Sec. 3087, Civ. C. 1895; re-en. Sec. 5426, Rev. C. 1907; re-en. Sec. 7941, R.C. 1921; Cal. Civ. C. Sec. 2311; Field Civ. C. Sec. 1229; re-en. Sec. 7941, R.C.M. 1935; R.C.M. 19 2-118.

28-10-213. Ratification not to prejudice third persons. N unauthorized act can be made valid retroactively to the prejudice of thi persons without their consent.

History: En. Sec. 3089, Civ. C. 1895; re-en. Sec. 5428, Rev. C. 1907; re-en. Sec. 7943, R.C. 1921; Cal. Civ. C. Sec. 2313; Field Civ. C. Sec. 1231; re-en. Sec. 7943, R.C.M. 1935; R.C.M. 19 2-120.

28-10-214. When ratification void. A ratification is not valid unles at the time of ratifying the act done, the principal has power to conf authority for such an act.

History: En. Sec. 3088, Civ. C. 1895; re-en. Sec. 5427, Rev. C. 1907; re-en. Sec. 7942, R.C. 1921; Cal. Civ. C. Sec. 2312; Field Civ. C. Sec. 1230; re-en. Sec. 7942, R.C.M. 1935; R.C.M. 19 2-119.

28-10-215. When ratification may be rescinded. A ratification
ay be rescinded when made without such consent as is required in a con-
act or with an imperfect knowledge of the material facts of the transaction
tified, but not otherwise.

History: En. Sec. 3090, Civ. C. 1895; re-en. Sec. 5429, Rev. C. 1907; re-en. Sec. 7944, R.C.M.
21; Cal. Civ. C. Sec. 2314; Field Civ. C. Sec. 1232; re-en. Sec. 7944, R.C.M. 1935; R.C.M. 1947,
21.

Part 3

Duties of Agent

28-10-301. Agent not to exceed actual authority. An agent must
t exceed the limits of his actual authority as defined by this chapter and
rts 5 and 6 of chapter 11 of Title 30.

History: En. Sec. 2740, Civ. C. 1895; re-en. Sec. 5286, Rev. C. 1907; re-en. Sec. 7801, R.C.M.
21; Cal. Civ. C. Sec. 2019; Field Civ. C. Sec. 1041; re-en. Sec. 7801, R.C.M. 1935; R.C.M. 1947,
09; amd. Sec. 30, Ch. 117, L. 1979.

28-10-302. Duty to keep principal informed. An agent must use
dinary diligence to keep his principal informed of his acts in the course of
e agency.

History: En. Sec. 2741, Civ. C. 1895; re-en. Sec. 5287, Rev. C. 1907; re-en. Sec. 7802, R.C.M.
21; Cal. Civ. C. Sec. 2020; Field Civ. C. Sec. 1042; re-en. Sec. 7802, R.C.M. 1935; R.C.M. 1947,
10.

**28-10-303. Duty of agent employed to collect negotiable instru-
ent.** An agent employed to collect a negotiable instrument must collect it
omptly and take all measures necessary to charge the parties thereto in
se of its dishonor and, if it is a bill of exchange, present it for acceptance
th reasonable diligence.

History: En. Sec. 2742, Civ. C. 1895; re-en. Sec. 5288, Rev. C. 1907; re-en. Sec. 7803, R.C.M.
21; Cal. Civ. C. Sec. 2021; Field Civ. C. Sec. 1043; re-en. Sec. 7803, R.C.M. 1935; R.C.M. 1947,
11.

Part 4

Authority of Agent

28-10-401. What authority agent has. An agent has such authority
the principal actually or ostensibly confers upon him.

History: En. Sec. 3091, Civ. C. 1895; re-en. Sec. 5430, Rev. C. 1907; re-en. Sec. 7945, R.C.M.
21; Cal. Civ. C. Sec. 2315; Field Civ. C. Sec. 1233; re-en. Sec. 7945, R.C.M. 1935; R.C.M. 1947,
22.

28-10-402. Actual authority defined. Actual authority is such as the
incipal intentionally confers upon the agent or intentionally or by want of
dinary care allows the agent to believe himself to possess.

History: En. Sec. 3092, Civ. C. 1895; re-en. Sec. 5431, Rev. C. 1907; re-en. Sec. 7946, R.C.M.
21; Cal. Civ. C. Sec. 2316; Field Civ. C. Sec. 1234; re-en. Sec. 7946, R.C.M. 1935; R.C.M. 1947,
23.

28-10-403. Ostensible authority defined. Ostensible authority i such as a principal, intentionally or by want of ordinary care, causes c allows a third person to believe the agent to possess.

History: En. Sec. 3093, Civ. C. 1895; re-en. Sec. 5432, Rev. C. 1907; re-en. Sec. 7947, R.C.M 1921; Cal. Civ. C. Sec. 2317; Field Civ. C. Sec. 1235; re-en. Sec. 7947, R.C.M. 1935; R.C.M. 194 2-124.

28-10-404. When and as to whom agent's authority restricte Every agent has actually such authority as is defined by this chapter an parts 5 and 6 of chapter 11 of Title 30 unless specially deprived thereof b his principal and has even then such authority ostensibly except as to per sons who have actual or constructive notice of the restriction upon hi authority.

History: En. Sec. 3094, Civ. C. 1895; re-en. Sec. 5433, Rev. C. 1907; re-en. Sec. 7948, R.C.M 1921; Cal. Civ. C. Sec. 2318; Field Civ. C. Sec. 1236; re-en. Sec. 7948, R.C.M. 1935; R.C.M. 194 2-125; amd. Sec. 31, Ch. 117, L. 1979.

28-10-405. Implied powers of agent. An agent has authority to:

(1) do everything necessary and proper and usual, in the ordinary cours of business, for effecting the purpose of his agency; and

(2) make a representation respecting any matter of fact, except the term of his authority, upon which his right to use his authority depends and th truth of which cannot be determined by the use of reasonable diligence o the part of the person to whom the representation is made.

History: En. Sec. 3095, Civ. C. 1895; re-en. Sec. 5434, Rev. C. 1907; re-en. Sec. 7949, R.C.M 1921; Cal. Civ. C. Sec. 2319; Field Civ. C. Sec. 1237; re-en. Sec. 7949, R.C.M. 1935; R.C.M. 194 2-126; amd. Sec. 32, Ch. 117, L. 1979.

28-10-406. Interpretation of authority given partly in genera and partly in specific terms. When an authority is given partly in gen eral and partly in specific terms, the general authority gives no higher power than those specifically mentioned.

History: En. Sec. 3097, Civ. C. 1895; re-en. Sec. 5436, Rev. C. 1907; re-en. Sec. 7951, R.C.M 1921; Cal. Civ. C. Sec. 2321; Field Civ. C. Sec. 1239; re-en. Sec. 7951, R.C.M. 1935; R.C.M. 194 2-128.

28-10-407. Statutory exceptions to general authority. An author ity expressed in general terms, however broad, does not authorize an agen to:

(1) act in his own name unless it is the usual course of business to do so;

(2) define the scope of his agency; or

(3) do any act which a trustee is forbidden to do by Title 72, chapter 2 part 2.

History: En. Sec. 3098, Civ. C. 1895; re-en. Sec. 5437, Rev. C. 1907; re-en. Sec. 7952, R.C.M 1921; Cal. Civ. C. Sec. 2322; Field Civ. C. Sec. 1240; re-en. Sec. 7952, R.C.M. 1935; R.C.M. 194 2-129.

28-10-408. When agent may disobey instructions. An agent ha power to disobey instructions in dealing with the subject of the agency i cases where it is clearly for the interest of his principal that he should d so and there is not time to communicate with the principal.

History: En. Sec. 3096, Civ. C. 1895; re-en. Sec. 5435, Rev. C. 1907; re-en. Sec. 7950, R.C.M 1921; Cal. Civ. C. Sec. 2320; Field Civ. C. Sec. 1238; re-en. Sec. 7950, R.C.M. 1935; R.C.M. 194 2-127.

28-10-409. No authority to defraud principal. An agent can never ave authority, either actual or ostensible, to do an act which is and is nown or suspected by the person with whom he deals to be a fraud upon e principal.

History: En. Sec. 3082, Civ. C. 1895; re-en. Sec. 5421, Rev. C. 1907; re-en. Sec. 7936, R.C.M. 21; Cal. Civ. C. Sec. 2306; Field Civ. C. Sec. 1224; re-en. Sec. 7936, R.C.M. 1935; R.C.M. 1947, 113.

28-10-410 through 28-10-420 reserved.

28-10-421. What included in authority to sell personal prop-rty. An authority to sell personal property includes authority to warrant e title of the principal and the quantity and quality of the property.

History: En. Sec. 3099, Civ. C. 1895; re-en. Sec. 5438, Rev. C. 1907; re-en. Sec. 7953, R.C.M. 21; Cal. Civ. C. Sec. 2323; Field Civ. C. Sec. 1241; re-en. Sec. 7953, R.C.M. 1935; R.C.M. 1947, 130.

28-10-422. What included in authority to sell real property. An thority to sell and convey real property includes authority to give the usual venants of warranty.

History: En. Sec. 3100, Civ. C. 1895; re-en. Sec. 5439, Rev. C. 1907; re-en. Sec. 7954, R.C.M. 21; Cal. Civ. C. Sec. 2324; Field Civ. C. Sec. 1242; re-en. Sec. 7954, R.C.M. 1935; R.C.M. 1947, 131.

28-10-423. Authority of agent to sell to receive price. A general ent to sell who is entrusted by the principal with the possession of the ing sold has authority to receive the price. A special agent to sell has thority to receive the price on delivery of the thing sold, but not after-ards.

History: En. Secs. 3101, 3102, Civ. C. 1895; re-en. Secs. 5440, 5441, Rev. C. 1907; re-en. Secs. 55, 7956, R.C.M. 1921; Cal. Civ. C. Secs. 2325, 2326; Field Civ. C. Secs. 1243, 1244; re-en. Secs. 55, 7956, R.C.M. 1935; R.C.M. 1947, 2-132, 2-133.

Part 5

Subagents

28-10-501. When agent may delegate powers. An agent, unless ecially forbidden by his principal to do so, can delegate his powers to other person in any of the following cases and in no others:

(1) when the act to be done is purely mechanical;

(2) when it is such as the agent cannot himself and the subagent can law-lly perform;

(3) when it is the usage of the place to delegate such powers; or

(4) when such delegation is specially authorized by the principal.

History: En. Sec. 3140, Civ. C. 1895; re-en. Sec. 5456, Rev. C. 1907; re-en. Sec. 7971, R.C.M. 21; Cal. Civ. C. Sec. 2349; Field Civ. C. Sec. 1259; re-en. Sec. 7971, R.C.M. 1935; R.C.M. 1947, 01.

28-10-502. Effect of unauthorized employment of subagent. If agent employs a subagent without authority, the former is a principal and e latter his agent and the principal of the former has no connection with the latter. A mere agent of an agent is not responsible as such to the principal of the latter.

History: En. Secs. 2743, 3141, Civ. C. 1895; re-en. Secs. 5289, 5457, Rev. C. 1907; re-en. Secs 7804, 7972, R.C.M. 1921; Cal. Civ. C. Secs. 2022, 2350; Field Civ. C. Secs. 1044, 1260; re-en. Secs 7804, 7972, R.C.M. 1935; R.C.M. 1947, 2-112, 2-302.

28-10-503. Effect of authorized employment of subagent. A subagent lawfully appointed represents the principal in like manner with the original agent, and the original agent is not responsible to third persons for the acts of the subagent.

History: En. Sec. 3142, Civ. C. 1895; re-en. Sec. 5458, Rev. C. 1907; re-en. Sec. 7973, R.C.M 1921; Cal. Civ. C. Sec. 2351; Field Civ. C. Sec. 1261; re-en. Sec. 7973, R.C.M. 1935; R.C.M. 1947 2-303.

Part 6

Rights and Liabilities of Principal

28-10-601. Accrual of rights and liabilities to principal. An agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal.

History: En. Sec. 3110, Civ. C. 1895; re-en. Sec. 5442, Rev. C. 1907; re-en. Sec. 7957, R.C.M 1921; Cal. Civ. C. Sec. 2330; Field Civ. C. Sec. 1245; re-en. Sec. 7957, R.C.M. 1935; R.C.M. 1947 2-201.

28-10-602. Principal's responsibility for agent's negligence omissions, and wrongs. (1) Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.

(2) A principal is responsible for no other wrongs committed by his agent than those mentioned in subsection (1) unless he has authorized or ratified them, even though they are committed while the agent is engaged in his service.

History: En. Secs. 3118, 3119, Civ. C. 1895; re-en. Secs. 5450, 5451, Rev. C. 1907; re-en. Secs 7965, 7966, R.C.M. 1921; Cal. Civ. C. Secs. 2338, 2339; Field Civ. C. Secs. 1253, 1254; re-en. Secs 7965, 7966, R.C.M. 1935; R.C.M. 1947, 2-209, 2-210.

28-10-603. When instrument binds principal. An instrument within the scope of his authority by which an agent intends to bind his principal does bind him if such intent is plainly inferable from the instrument itself.

History: En. Sec. 3117, Civ. C. 1895; re-en. Sec. 5449, Rev. C. 1907; re-en. Sec. 7964, R.C.M 1921; Cal. Civ. C. Sec. 2337; Field Civ. C. Sec. 1252; re-en. Sec. 7964, R.C.M. 1935; R.C.M. 1947 2-208.

28-10-604. When notice to principal or agent is notice to the other. As against a principal, both principal and agent are deemed to have notice of whatever either has notice of and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other.

History: En. Sec. 3112, Civ. C. 1895; re-en. Sec. 5444, Rev. C. 1907; re-en. Sec. 7959, R.C.M 1921; Cal. Civ. C. Sec. 2332; Field Civ. C. Sec. 1247; re-en. Sec. 7959, R.C.M. 1935; R.C.M. 1947 2-203.

28-10-605. Extent to which principal bound when agent xceeds authority. When an agent exceeds his authority, his principal is ound by his authorized acts only so far as they can be plainly separated om those which are unauthorized.

History: En. Sec. 3113, Civ. C. 1895; re-en. Sec. 5445, Rev. C. 1907; re-en. Sec. 7960, R.C.M. 21; Cal. Civ. C. Sec. 2333; Field Civ. C. Sec. 1248; re-en. Sec. 7960, R.C.M. 1935; R.C.M. 1947, 204.

28-10-606. Extent to which principal bound by acts under stensible authority. A principal is bound by acts of his agent under a erely ostensible authority to those persons only who have in good faith and ithout ordinary negligence incurred a liability or parted with value upon the ith thereof.

History: En. Sec. 3114, Civ. C. 1895; re-en. Sec. 5446, Rev. C. 1907; re-en. Sec. 7961, R.C.M. 21; Cal. Civ. C. Sec. 2334; Field Civ. C. Sec. 1249; re-en. Sec. 7961, R.C.M. 1935; R.C.M. 1947, 205.

28-10-607. When principal bound by incomplete execution of uthority. A principal is bound by an incomplete execution of an authority hen it is consistent with the whole purpose and scope thereof, but not therwise.

History: En. Sec. 3111, Civ. C. 1895; re-en. Sec. 5443, Rev. C. 1907; re-en. Sec. 7958, R.C.M. 21; Cal. Civ. C. Sec. 2331; Field Civ. C. Sec. 1246; re-en. Sec. 7958, R.C.M. 1935; R.C.M. 1947, 202.

28-10-608. Rights of person who deals with agent without nowledge of agency. One who deals with an agent without knowing or aving reason to believe that the agent acts as such in the transaction may t off against any claim of the principal arising out of the same all claims hich he might have set off against the agent before notice of the agency.

History: En. Sec. 3116, Civ. C. 1895; re-en. Sec. 5448, Rev. C. 1907; re-en. Sec. 7963, R.C.M. 21; Cal. Civ. C. Sec. 2336; Field Civ. C. Sec. 1251; re-en. Sec. 7963, R.C.M. 1935; R.C.M. 1947, 207.

28-10-609. Principal's liability when agent given exclusive redit. If exclusive credit is given to an agent by the person dealing with m, his principal is exonerated by payment or other satisfaction made by m to his agent in good faith before receiving notice of the creditor's elec-on to hold him responsible.

History: En. Sec. 3115, Civ. C. 1895; re-en. Sec. 5447, Rev. C. 1907; re-en. Sec. 7962, R.C.M. 21; Cal. Civ. C. Sec. 2335; Field Civ. C. Sec. 1250; re-en. Sec. 7962, R.C.M. 1935; R.C.M. 1947, 206.

Part 7

Agent's Responsibility to Third Persons

28-10-701. Warranty of authority. One who assumes to act as an ent thereby warrants to all who deal with him in that capacity that he has e authority which he assumes.

History: En. Sec. 3130, Civ. C. 1895; re-en. Sec. 5452, Rev. C. 1907; re-en. Sec. 7967, R.C.M. 21; Cal. Civ. C. Sec. 2342; Field Civ. C. Sec. 1255; re-en. Sec. 7967, R.C.M. 1935; R.C.M. 1947, 11.

28-10-702. When agent responsible to third persons as a principal. One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency in any of the following cases and in no other:

(1) when, with his consent, credit is given to him personally in a transaction;

(2) when he enters into a written contract in the name of his principa without believing in good faith that he has authority to do so; or

(3) when his acts are wrongful in their nature.

History: En. Sec. 3131, Civ. C. 1895; re-en. Sec. 5453, Rev. C. 1907; re-en. Sec. 7968, R.C.M 1921; Cal. Civ. C. Sec. 2343; Field Civ. C. Sec. 1256; re-en. Sec. 7968, R.C.M. 1935; R.C.M. 1947 2-212.

28-10-703. Responsibility of agent when third person claims property received for principal. If an agent receives anything for the benefit of his principal to the possession of which another person is entitled he must, on demand, surrender it to such person, or so much of it as he has under his control at the time of demand, on being indemnified for any advance which he has made to his principal, in good faith, on account of the same. He is responsible therefor if, after such demand, he delivers it to his principal.

History: En. Sec. 3132, Civ. C. 1895; re-en. Sec. 5454, Rev. C. 1907; re-en. Sec. 7969, R.C.M 1921; Cal. Civ. C. Sec. 2344; Field Civ. C. Sec. 1257; re-en. Sec. 7969, R.C.M. 1935; R.C.M. 1947 2-213; amd. Sec. 33, Ch. 117, L. 1979.

28-10-704. Applicability of laws relating to capacity to contract. The provisions of this part are subject to the provisions of chapter 2 part 2; 28-10-104; and Title 41, chapter 1.

History: En. Sec. 3133, Civ. C. 1895; re-en. Sec. 5455, Rev. C. 1907; re-en. Sec. 7970, R.C.M 1921; Cal. Civ. C. Sec. 2345; Field Civ. C. Sec. 1258; re-en. Sec. 7970, R.C.M. 1935; R.C.M. 1947 2-214; amd. Sec. 34, Ch. 117, L. 1979.

Part 8

Termination of Agency

28-10-801. Circumstances which terminate any agency. An agency is terminated as to every person having notice thereof by:

(1) the expiration of its term;

(2) the extinction of its subject;

(3) the death of the agent;

(4) his renunciation of the agency; or

(5) the incapacity of the agent to act as such.

History: En. Sec. 3150, Civ. C. 1895; re-en. Sec. 5459, Rev. C. 1907; re-en. Sec. 7974, R.C.M 1921; Cal. Civ. C. Sec. 2355; Field Civ. C. Sec. 1262; re-en. Sec. 7974, R.C.M. 1935; R.C.M. 1947 2-304.

28-10-802. Circumstances which terminate agency not coupled with an interest. Unless the power of the agent is coupled with an interest in the subject of the agency, it is terminated as to every person having notice thereof by:

(1) its revocation by the principal;

(2) his death; or

(3) his incapacity to contract.

History: En. Sec. 3151, Civ. C. 1895; re-en. Sec. 5460, Rev. C. 1907; re-en. Sec. 7975, R.C.M. 921; Cal. Civ. C. Sec. 2356; Field Civ. C. Sec. 1263; re-en. Sec. 7975, R.C.M. 1935; R.C.M. 1947, -305.

CHAPTER 11

GUARANTY, INDEMNITY, AND SURETYSHIP

Part 1 — Guaranty—General Provisions

ection
8-11-101. Guaranty defined.
8-11-102. Knowledge or consent of principal not required.
8-11-103. When separate consideration required.
8-11-104. Guaranty generally to be in writing — form.
8-11-105. When guaranty considered original obligation and need not be in writing.
8-11-106. When notice of acceptance necessary to bind guarantor.
8-11-107. When guaranty considered unconditional.
8-11-108. Continuing guaranty — definition, revocation.

Part 2 — Guaranty
Liability and Exoneration of Guarantor

8-11-201. Obligation of guarantor not to exceed that of principal.
8-11-202. Liability under guaranty of incomplete contract.
8-11-203. Liability under guaranty of illegal contract or contract void against principal.
8-11-204. Liability under guaranty that obligation is good or collectable.
8-11-205. When guarantor of payment or performance becomes liable.
8-11-206. Liability upon guaranty of conditional obligation — notice of default.
Sections 28-11-207 through 28-11-210 reserved.
8-11-211. When guarantor exonerated.
8-11-212. Recission of alteration — liability not restored.
8-11-213. Guarantor not exonerated by delay of creditor.
8-11-214. Guarantor not exonerated by discharge of principal.
8-11-215. Exoneration of guarantor indemnified by principal.
8-11-216. Effect of part performance on guarantor's liability.

Part 3 — Indemnity

8-11-301. Indemnity defined.
8-11-302. Indemnity for future unlawful act void.
8-11-303. Indemnity for past wrongful act valid.
8-11-304. Indemnity extended to acts of agents.
8-11-305. Indemnification of several persons.
Sections 28-11-306 through 28-11-310 reserved.
8-11-311. Person indemnifying liable jointly and severally.
8-11-312. When person indemnifying entitled to reimbursement.
8-11-313. Interpretation of contract of indemnity.
8-11-314. When and what person indemnified entitled to recover.
-11-315. Costs of defense.
-11-316. Duty of person indemnifying to defend.
-11-317. When judgment not conclusive against person indemnifying.

Part 4 — Suretyship

-11-401. Surety defined.
-11-402. When apparent principal may show he is a surety.
-11-403. Interpretation of contract of suretyship.
-11-404. Suretyship unaffected by judgment against surety.

Sections 28-11-405 through 28-11-410 reserved.
28-11-411. Extent of surety's liability.
28-11-412. Exoneration of surety.
28-11-413. Effect of performance or offer of performance on surety's liability.
28-11-414. Application to surety of rights of guarantor.
28-11-415. Power of surety to compel principal to perform.
28-11-416. When surety may require creditor to pursue remedy.
28-11-417. Surety's right to reimbursement and contribution.
28-11-418. Surety entitled to benefit of security held by creditor or cosurety.
28-11-419. Creditor entitled to benefit of security held by surety.
28-11-420. Principal's property to be taken first.

Part 1

Guaranty — General Provisions

28-11-101. Guaranty defined. A guaranty is a promise to answer for the debt, default, or miscarriage of another person.

History: En. Sec. 3600, Civ. C. 1895; re-en. Sec. 5656, Rev. C. 1907; re-en. Sec. 8171, R.C.M. 1921; Cal. Civ. C. Sec. 2787; Field Civ. C. Sec. 1534; re-en. Sec. 8171, R.C.M. 1935; R.C.M. 1947, 30-101.

28-11-102. Knowledge or consent of principal not required. A person may become guarantor even without the knowledge or consent of the principal.

History: En. Sec. 3601, Civ. C. 1895; re-en. Sec. 5657, Rev. C. 1907; re-en. Sec. 8172, R.C.M. 1921; Cal. Civ. C. Sec. 2788; Field Civ. C. Sec. 1535; re-en. Sec. 8172, R.C.M. 1935; R.C.M. 1947, 30-102.

28-11-103. When separate consideration required. Where a guaranty is entered into at the same time with the original obligation or with the acceptance of the latter by the guarantee and forms with that obligation a part of the consideration to him, no other consideration need exist. In all other cases, there must be a consideration distinct from that of the original obligation.

History: En. Sec. 3610, Civ. C. 1895; re-en. Sec. 5658, Rev. C. 1907; re-en. Sec. 8173, R.C.M. 1921; Cal. Civ. C. Sec. 2792; Field Civ. C. Sec. 1536; re-en. Sec. 8173, R.C.M. 1935; R.C.M. 1947, 30-103.

28-11-104. Guaranty generally to be in writing — form. Except as prescribed by 28-11-105, a guaranty must be in writing and signed by the guarantor, but the writing need not express a consideration.

History: En. Sec. 3611, Civ. C. 1895; re-en. Sec. 5659, Rev. C. 1907; re-en. Sec. 8174, R.C.M. 1921; Cal. Civ. C. Sec. 2793; Field Civ. C. Sec. 1537; re-en. Sec. 8174, R.C.M. 1935; R.C.M. 1947, 30-104.

28-11-105. When guaranty considered original obligation and need not be in writing. A promise to answer for the obligation of another in any of the following cases is deemed an original obligation of the promisor and need not be in writing:

(1) where the promise is made by one who has received property of nother upon an undertaking to apply it pursuant to such promise or by one ho has received a discharge from an obligation, in whole or in part, in conderation of such promise;

(2) where the creditor parts with value or enters into an obligation in onsideration of the obligation in respect to which the promise is made, in erms or under circumstances such as to render the party making the prome the principal debtor and the person in whose behalf it is made his surety;

(3) where the promise, being for an antecedent obligation of another, is iade upon a consideration:

(a) that the party receiving it cancels the antecedent obligation, accepting ie new promise as a substitute therefor;

(b) that the party receiving it releases the property of another from a vy; or

(c) beneficial to the promisor, whether moving from either party to the ntecedent obligation or from another person;

(4) where a factor undertakes to sell merchandise for a commission and iarantee the sale;

(5) where the holder of an instrument for the payment of money upon hich a third person is or may become liable to him transfers it in payment a precedent debt of his own or for a new consideration and in connection ith such transfer enters into a promise respecting such instrument.

History: En. Sec. 3612, Civ. C. 1895; re-en. Sec. 5660, Rev. C. 1907; re-en. Sec. 8175, R.C.M. 21; Cal. Civ. C. Sec. 2794; Field Civ. C. Sec. 1538; re-en. Sec. 8175, R.C.M. 1935; R.C.M. 1947, -105.

28-11-106. When notice of acceptance necessary to bind uarantor. A mere offer of guaranty is not binding until notice of its accepnce is communicated by the guarantee to the guarantor, but an absolute iaranty is binding upon the guarantor without notice of acceptance.

History: En. Sec. 3613, Civ. C. 1895; re-en. Sec. 5661, Rev. C. 1907; re-en. Sec. 8176, R.C.M. 21; Cal. Civ. C. Sec. 2795; Field Civ. C. Sec. 1539; re-en. Sec. 8176, R.C.M. 1935; amd. Sec. 6, . 185, L. 1977; R.C.M. 1947, 30-106.

28-11-107. When guaranty considered unconditional. A guaranty to be deemed unconditional unless its terms import some condition precent to the liability of the guarantor.

History: En. Sec. 3630, Civ. C. 1895; re-en. Sec. 5666, Rev. C. 1907; re-en. Sec. 8181, R.C.M. 21; Cal. Civ. C. Sec. 2806; Field Civ. C. Sec. 1544; re-en. Sec. 8181, R.C.M. 1935; R.C.M. 1947, -201.

28-11-108. Continuing guaranty — definition, revocation. (1) A iaranty relating to a future liability of the principal under successive transtions which either continue his liability or from time to time renew it after has been satisfied is called a continuing guaranty.

(2) A continuing guaranty may be revoked at any time by the guarantor respect to future transactions unless there is a continuing consideration as such transactions which he does not renounce.

History: En. Secs. 3640, 3641, Civ. C. 1895; re-en. Secs. 5671, 5672, Rev. C. 1907; re-en. Secs. 86, 8187, R.C.M. 1921; Cal. Civ. C. Secs. 2814, 2815; Field Civ. C. Secs. 1549, 1550; re-en. Secs. 86, 8187, R.C.M. 1935; R.C.M. 1947, 30-206, 30-207.

Part 2

Guaranty — Liability and Exoneration of Guarantor

28-11-201. Obligation of guarantor not to exceed that of principal. The obligation of a guarantor must be neither larger in amount nor in other respects more burdensome than that of the principal, and if in its terms it exceeds it, it is reducible in proportion to the principal obligation.

History: En. Sec. 3633, Civ. C. 1895; re-en. Sec. 5669, Rev. C. 1907; re-en. Sec. 8184, R.C.M. 1921; Cal. Civ. C. Sec. 2809; Field Civ. C. Sec. 1547; re-en. Sec. 8184, R.C.M. 1935; R.C.M. 1947, 30-204.

28-11-202. Liability under guaranty of incomplete contract. In a guaranty of a contract the terms of which are not then settled, it is implied that its terms shall be such as will not expose the guarantor to greater risks than he would incur under those terms which are most common in similar contracts at the place where the principal contract is to be performed.

History: En. Sec. 3620, Civ. C. 1895; re-en. Sec. 5662, Rev. C. 1907; re-en. Sec. 8177, R.C.M. 1921; Cal. Civ. C. Sec. 2799; Field. Civ. C. Sec. 1540; re-en. Sec. 8177, R.C.M. 1935; R.C.M. 1947, 30-107.

28-11-203. Liability under guaranty of illegal contract or contract void against principal. A guarantor is not liable if the contract of the principal is unlawful, but he is liable notwithstanding any mere personal disability of the principal, though the disability be such as to make the contract void against the principal.

History: En. Sec. 3634, Civ. C. 1895; re-en. Sec. 5670, Rev. C. 1907; re-en. Sec. 8185, R.C.M. 1921; Cal. Civ. C. Sec. 2810; Field Civ. C. Sec. 1548; re-en. Sec. 8185, R.C.M. 1935; R.C.M. 1947, 30-205.

28-11-204. Liability under guaranty that obligation is good or collectable. (1) A guaranty to the effect that an obligation is good or is collectable imports that the debtor is solvent and that the demand is collectable by the usual legal proceedings if taken with reasonable diligence.

(2) A guaranty such as is mentioned in subsection (1) is not discharged by an omission to take proceedings upon the principal debt or upon any collateral security for its payment if no part of the debt could have been collected thereby.

(3) In the case mentioned in subsection (1), the removal of the principal from the state, leaving no property therein from which the obligation might be satisfied, is equivalent to the insolvency of the principal in its effect upon the rights and obligations of the guarantor.

History: En. Secs. 3621, 3622, 3623, Civ. C. 1895; re-en. Secs. 5663, 5664, 5665, Rev. C. 1907; re-en. Secs. 8178, 8179, 8180, R.C.M. 1921; Cal. Civ. C. Secs. 2800, 2801, 2802; Field Civ. C. Secs. 1541, 1542, 1543; re-en. Secs. 8178, 8179, 8180, R.C.M. 1935; R.C.M. 1947, 30-108, 30-109, 30-110.

28-11-205. When guarantor of payment or performance becomes liable. A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal and without demand or notice.

History: En. Sec. 3631, Civ. C. 1895; re-en. Sec. 5667, Rev. C. 1907; re-en. Sec. 8182, R.C.M. 1921; Cal. Civ. C. Sec. 2807; Field Civ. C. Sec. 1545; re-en. Sec. 8182, R.C.M. 1935; R.C.M. 1947, 30-202.

28-11-206. Liability upon guaranty of conditional obligation — otice of default. Where one guarantees a conditional obligation, his liabil- is commensurate with that of the principal and he is not entitled to otice of the default of the principal unless he is unable, by the exercise of asonable diligence, to acquire information of such default and the creditor s actual notice thereof.

History: En. Sec. 3632, Civ. C. 1895; re-en. Sec. 5668, Rev. C. 1907; re-en. Sec. 8183, R.C.M. 21; Cal. Civ. C. Sec. 2808; Field Civ. C. Sec 1546; re-en. Sec. 8183, R.C.M. 1935; R.C.M. 1947, -203.

28-11-207 through 28-11-210 reserved.

28-11-211. When guarantor exonerated. (1) A guarantor is exon- ated, except so far as he may be indemnified by the principal, if by any t of the creditor without the consent of the guarantor the original obli- tion of the principal is altered in any respect or the remedies or rights of e creditor against the principal in respect thereto are in any way impaired suspended.

(2) A promise by a creditor which for any cause is void or voidable by m at his option does not alter the obligation or suspend or impair the medy within the meaning of subsection (1).

istory: En. Secs. 3650, 3651, Civ. C. 1895; re-en. Secs. 5673, 5674, Rev. C. 1907; re-en. Secs. 88, 8189, R.C.M. 1921; Cal. Civ. C. Secs. 2819, 2820; Field Civ. C. Secs. 1551, 1552; re-en. Secs. 88, 8189, R.C.M. 1935; R.C.M. 1947, 30-208, 30-209.

28-11-212. Rescission of alteration — liability not restored. The scission of an agreement altering the original obligation of a debtor or pairing the remedy of a creditor does not restore the liability of a guaran- who has been exonerated by such agreement.

istory: En. Sec. 3652, Civ. C. 1895; re-en. Sec. 5675, Rev. C. 1907; re-en. Sec. 8190, R.C.M. 1; Cal. Civ. C. Sec. 2821; Field Civ. C. Sec. 1553; re-en. Sec. 8190, R.C.M. 1935; R.C.M. 1947, 210.

28-11-213. Guarantor not exonerated by delay of creditor. Mere lay on the part of a creditor to proceed against the principal or to enforce y other remedy does not exonerate a guarantor.

istory: En. Sec. 3654, Civ. C. 1895; re-en. Sec. 5677, Rev. C. 1907; re-en. Sec. 8192, R.C.M. 1; Cal. Civ. C. Sec. 2823; Field Civ. C. Sec. 1555; re-en. Sec. 8192, R.C.M. 1935; R.C.M. 1947, 212.

28-11-214. Guarantor not exonerated by discharge of principal. guarantor is not exonerated by the discharge of his principal by operation law without the intervention or omission of the creditor.

istory: En. Sec. 3656, Civ. C. 1895; re-en. Sec. 5679, Rev. C. 1907; re-en. Sec. 8194, R.C.M. 1; Cal. Civ. C. Sec. 2825; Field Civ. C. Sec. 1557; re-en. Sec. 8194, R.C.M. 1935; R.C.M. 1947, 214.

28-11-215. Exoneration of guarantor indemnified by principal. guarantor who has been indemnified by the principal is liable to the credi- to the extent of the indemnity notwithstanding that the creditor, without assent of the guarantor, may have modified the contract or released the ncipal.

istory: En. Sec. 3655, Civ. C. 1895; re-en. Sec. 5678, Rev. C. 1907; re-en. Sec. 8193, R.C.M. 1; Cal. Civ. C. Sec. 2824; Field Civ. C. Sec. 1556; re-en. Sec. 8193, R.C.M. 1935; R.C.M. 1947, 213.

28-11-216. Effect of part performance on guarantor's liability. The acceptance by a creditor of anything in partial satisfaction of an obligation reduces the obligation of a guarantor thereof in the same measure as that of the principal but does not otherwise affect it.

History: En. Sec. 3653, Civ. C. 1895; re-en. Sec. 5676, Rev. C. 1907; re-en. Sec. 8191, R.C.M. 1921; Cal. Civ. C. Sec. 2822; Field Civ. C. Sec. 1554; re-en. Sec. 8191, R.C.M. 1935; R.C.M. 1947, 30-211.

Part 3

Indemnity

28-11-301. Indemnity defined. Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties or of some other person.

History: En. Sec. 3580, Civ. C. 1895; re-en. Sec. 5648, Rev. C. 1907; re-en. Sec. 8163, R.C.M. 1921; Cal. Civ. C. Sec. 2772; Field Civ. C. Sec. 1524; re-en. Sec. 8163, R.C.M. 1935; R.C.M. 1947, 30-301.

28-11-302. Indemnity for future unlawful act void. An agreement to indemnify a person against an act thereafter to be done is void if the act be known by such person, at the time of doing it, to be unlawful.

History: En. Sec. 3581, Civ. C. 1895; re-en. Sec. 5649, Rev. C. 1907; re-en. Sec. 8164, R.C.M. 1921; Cal. Civ. C. Sec. 2773; Field Civ. C. Sec. 1525; re-en. Sec. 8164, R.C.M. 1935; R.C.M. 1947, 30-302.

28-11-303. Indemnity for past wrongful act valid. An agreement to indemnify a person against an act already done is valid, even though the act was known to be wrongful, unless it was a felony.

History: En. Sec. 3582, Civ. C. 1895; re-en. Sec. 5650, Rev. C. 1907; re-en. Sec. 8165, R.C.M. 1921; Cal. Civ. C. Sec. 2774; Field Civ. C. Sec. 1526; re-en. Sec. 8165, R.C.M. 1935; R.C.M. 1947, 30-303.

28-11-304. Indemnity extended to acts of agents. An agreement to indemnify against the acts of a certain person applies not only to his acts and their consequences but also to those of his agents.

History: En. Sec. 3583, Civ. C. 1895; re-en. Sec. 5651, Rev. C. 1907; re-en. Sec. 8166, R.C.M. 1921; Cal. Civ. C. Sec. 2775; Field Civ. C. Sec. 1527; re-en. Sec. 8166, R.C.M. 1935; R.C.M. 1947, 30-304.

28-11-305. Indemnification of several persons. An agreement to indemnify several persons applies to each unless a contrary intention appears.

History: En. Sec. 3584, Civ. C. 1895; re-en. Sec. 5652, Rev. C. 1907; re-en. Sec. 8167, R.C.M. 1921; Cal. Civ. C. Sec. 2776; Field Civ. C. Sec. 1528; re-en. Sec. 8167, R.C.M. 1935; R.C.M. 1947, 30-305.

28-11-306 through 28-11-310 reserved.

28-11-311. Person indemnifying liable jointly and severally. One who indemnifies another against an act to be done by the latter is liable jointly with the person indemnified and separately to every person injured by such act.

History: En. Sec. 3585, Civ. C. 1895; re-en. Sec. 5653, Rev. C. 1907; re-en. Sec. 8168, R.C.M. 1921; Cal. Civ. C. Sec. 2777; Field Civ. C. Sec. 1529; re-en. Sec. 8168, R.C.M. 1935; R.C.M. 1947, 30-306.

**28-11-312. When person indemnifying entitled to reimburse-
nt.** Where one at the request of another engages to answer in damages,
ether liquidated or unliquidated, for any violation of duty on the part of
latter, he is entitled to be reimbursed in the same manner as a surety
whatever he may pay.

istory: En. Sec. 3587, Civ. C. 1895; re-en. Sec. 5655, Rev. C. 1907; re-en. Sec. 8170, R.C.M.
1; Cal. Civ. C. Sec. 2779; Field Civ. C. Sec. 1531; re-en. Sec. 8170, R.C.M. 1935; R.C.M. 1947,
308.

28-11-313. Interpretation of contract of indemnity. In the inter-
tation of a contract of indemnity, the rules prescribed in 28-11-314
ough 28-11-317 are to be applied unless a contrary intention appears.

istory: En. Sec. 3586, Civ. C. 1895; re-en. Sec. 5654, Rev. C. 1907; re-en. Sec. 8169, R.C.M.
1; Cal. Civ. C. Sec. 2778; Field Civ. C. Sec. 1530; re-en. Sec. 8169, R.C.M. 1935; R.C.M. 1947,
307(part).

**28-11-314. When and what person indemnified entitled to
cover.** (1) Upon an indemnity against liability, expressly or in other
ivalent terms, the person indemnified is entitled to recover upon becom-
liable.

2) Upon an indemnity against claims, demands, damages, or costs,
ressly or in other equivalent terms, the person indemnified is not entitled
recover without payment thereof.

istory: En. Sec. 3586, Civ. C. 1895; re-en. Sec. 5654, Rev. C. 1907; re-en. Sec. 8169, R.C.M.
1; Cal. Civ. C. Sec. 2778; Field Civ. C. Sec. 1530; re-en. Sec. 8169, R.C.M. 1935; R.C.M. 1947,
07(1), (2).

28-11-315. Costs of defense. An indemnity against claims, demands,
liability, expressly or in other equivalent terms, embraces the costs of
ense against such claims, demands, or liability incurred in good faith and
he exercise of a reasonable discretion.

istory: En. Sec. 3586, Civ. C. 1895; re-en. Sec. 5654, Rev. C. 1907; re-en. Sec. 8169, R.C.M.
1; Cal. Civ. C. Sec. 2778; Field Civ. C. Sec. 1530; re-en. Sec. 8169, R.C.M. 1935; R.C.M. 1947,
07(3).

8-11-316. Duty of person indemnifying to defend. The person
emnifying is bound, on request of the person indemnified, to defend
ions or proceedings brought against the latter in respect to the matters
braced by the indemnity, but the person indemnified has the right to con-
t such defenses if he chooses to do so. If after request the person indem-
ing neglects to defend the person indemnified, a recovery against the
er suffered by him in good faith is conclusive in his favor against the
ner.

istory: En. Sec. 3586, Civ. C. 1895; re-en. Sec. 5654, Rev. C. 1907; re-en. Sec. 8169, R.C.M.
; Cal. Civ. C. Sec. 2778; Field Civ. C. Sec. 1530; re-en. Sec. 8169, R.C.M. 1935; R.C.M. 1947,
07(4), (5).

**8-11-317. When judgment not conclusive against person
emnifying.** (1) If the person indemnifying, whether he is a principal or
rety in the agreement, does not have reasonable notice of the action or
ceeding against the person indemnified or is not allowed to control his
ense, judgment against the latter is only presumptive evidence against the
ner.

(2) A stipulation that a judgment against the person indemnified shall b conclusive upon the person indemnifying is inapplicable if he had a goo defense upon the merits which by want of ordinary care he failed to establis in the action.

History: En. Sec. 3586, Civ. C. 1895; re-en. Sec. 5654, Rev. C. 1907; re-en. Sec. 8169, R.C.M 1921; Cal. Civ. C. Sec. 2778; Field Civ. C. Sec. 1530; re-en. Sec. 8169, R.C.M. 1935; R.C.M. 194 30-307(6), (7).

Part 4

Suretyship

28-11-401. Surety defined. A surety is one who, at the request o another and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third perso or hypothecates property as security therefor.

History: En. Sec. 3670, Civ. C. 1895; re-en. Sec. 5680, Rev. C. 1907; re-en. Sec. 8195, R.C.M 1921; Cal. Civ. C. Sec. 2831; Field Civ. C. Sec. 1558; re-en. Sec. 8195, R.C.M. 1935; R.C.M. 194 30-401.

28-11-402. When apparent principal may show he is a surety One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety except as against persons who have acted on the faith of his apparent character of principal.

History: En. Sec. 3671, Civ. C. 1895; re-en. Sec. 5681, Rev. C. 1907; re-en. Sec. 8196, R.C.M 1921; Cal. Civ. C. Sec. 2832; Field Civ. C. Sec. 1559; re-en. Sec. 8196, R.C.M. 1935; R.C.M. 194 30-402.

28-11-403. Interpretation of contract of suretyship. In interpreting the terms of a contract of suretyship, the same rules are to be observe as in the case of other contracts.

History: En. Sec. 3681, Civ. C. 1895; re-en. Sec. 5683, Rev. C. 1907; re-en. Sec. 8198, R.C.M 1921; Cal. Civ. C. Sec. 2837; Field Civ. C. Sec. 1561; re-en. Sec. 8198, R.C.M. 1935; R.C.M. 194 30-404.

28-11-404. Suretyship unaffected by judgment against surety Notwithstanding the recovery of judgment by a creditor against a surety, th latter still occupies the relation of surety.

History: En. Sec. 3682, Civ. C. 1895; re-en. Sec. 5684, Rev. C. 1907; re-en. Sec. 8199, R.C.M 1921; Cal. Civ. C. Sec. 2838; Field Civ. C. Sec. 1562; re-en. Sec. 8199, R.C.M. 1935; R.C.M. 194 30-405.

28-11-405 through 28-11-410 reserved.

28-11-411. Extent of surety's liability. A surety cannot be hel beyond the express terms of his contract, and if such contract prescribes penalty for its breach, he cannot in any case be liable for more than the penalty.

History: En. Sec. 3680, Civ. C. 1895; re-en. Sec. 5682, Rev. C. 1907; re-en. Sec. 8197, R.C.M 1921; Cal. Civ. C. Sec. 2836; Field Civ. C. Sec. 1560; re-en. Sec. 8197, R.C.M. 1935; R.C.M. 194 30-403.

28-11-412. Exoneration of surety. A surety is exonerated:

(1) in like manner with a guarantor;

(2) to the extent to which he is prejudiced by any act of the creditor hich would naturally prove injurious to the remedies of the surety or incon-stent with his rights or which lessens his security; or

(3) to the extent to which he is prejudiced by an omission of the creditor, hen required by the surety, to do anything which it is the creditor's duty do.

History: En. Sec. 3684, Civ. C. 1895; re-en. Sec. 5686, Rev. C. 1907; re-en. Sec. 8201, R.C.M. 21; Cal. Civ. C. Sec. 2840; Field Civ. Sec. 1564; re-en. Sec. 8201, R.C.M. 1935; amd. Sec. 8, Ch. 5, L. 1977; R.C.M. 1947, 30-407.

28-11-413. Effect of performance or offer of performance on urety's liability. Performance of the principal obligation or an offer of ch performance, duly made as provided in this code, exonerates a surety.

History: En. Sec. 3683, Civ. C. 1895; re-en. Sec. 5685, Rev. C. 1907; re-en. Sec. 8200, R.C.M. 21; Cal. Civ. C. Sec. 2839; Based on Field Civ. C. Sec. 1563; re-en. Sec. 8200, R.C.M. 1935; R.C.M. 47, 30-406.

28-11-414. Application to surety of rights of guarantor. A surety s all the right of a guarantor, whether he becomes personally responsible not.

History: En. Sec. 3690, Civ. C. 1895; re-en. Sec. 5687, Rev. C. 1907; re-en. Sec. 8202, R.C.M. 21; Cal. Civ. C. Sec. 2844; Field Civ. C. Sec. 1565; re-en. Sec. 8202, R.C.M. 1935; R.C.M. 1947, -501.

28-11-415. Power of surety to compel principal to perform. A rety may compel his principal to perform the obligations when due.

History: En. Sec. 3692, Civ. C. 1895; re-en. Sec. 5689, Rev. C. 1907; re-en. Sec. 8204, R.C.M. 21; Cal. Civ. C. Sec. 2846; Field Civ. C. Sec. 1567; re-en. Sec. 8204, R.C.M. 1935; R.C.M. 1947, -503.

28-11-416. When surety may require creditor to pursue emedy. A surety may require his creditor to proceed against the principal to pursue any other remedy in his power which the surety cannot himself rsue and which would lighten his burden, and if in such case the creditor glects to do so, the surety is exonerated to the extent to which he is ereby prejudiced.

History: En. Sec. 3691, Civ. C. 1895; re-en. Sec. 5688, Rev. C. 1907; re-en. Sec. 8203, R.C.M. 21; Cal. Civ. C. Sec. 2845; Field Civ. C. Sec. 1566; re-en. Sec. 8203, R.C.M. 1935; R.C.M. 1947, -502.

28-11-417. Surety's right to reimbursement and contribution. If a surety satisfies the principal obligation or any part thereof, whether th or without legal proceedings, the principal is bound to reimburse what surety has disbursed, including necessary costs and expenses, but the rety has no claim for reimbursement against other persons, though they ay have been benefited by his act, except as prescribed by subsection (2).

2) A surety, upon satisfying the obligation of the principal, is entitled to force every remedy which the creditor then has against the principal to the tent of reimbursing what the surety has expended and also to require all cosureties to contribute thereto without regard to the order of time in ich they became such.

History: En. Secs. 3693, 3694, Civ. C. 1895; re-en. Secs. 5690, 5691, Rev. C. 1907; re-en. Secs. 05, 8206, R.C.M. 1921; Cal. Civ. C. Secs. 2847, 2848; Field Civ. C. Secs. 1568, 1569; re-en. Secs. 05, 8206, R.C.M. 1935; R.C.M. 1947, 30-504, 30-505.

28-11-418. Surety entitled to benefit of security held by creditor or cosurety. A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor or by a cosurety at the time of entering into the contract of suretyship or acquired by him afterwards, whether the surety was aware of the security or not.

History: En. Sec. 3695, Civ. C. 1895; re-en. Sec. 5692, Rev. C. 1907; re-en. Sec. 8207, R.C.M. 1921; Cal. Civ. C. Sec. 2849; Field Civ. C. Sec. 1570; re-en. Sec. 8207, R.C.M. 1935; R.C.M. 1947, 30-506.

28-11-419. Creditor entitled to benefit of security held by surety. A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation and may, upon the maturity of the obligation, compel the application of such security to its satisfaction.

History: En. Sec. 3700, Civ. C. 1895; re-en. Sec. 5694, Rev. C. 1907; re-en. Sec. 8209, R.C.M. 1921; Cal. Civ. C. Sec. 2854; Field Civ. C. Sec. 1572; re-en. Sec. 8209, R.C.M. 1935; R.C.M. 1947, 30-508.

28-11-420. Principal's property to be taken first. Whenever property of a surety is hypothecated with property of the principal, the surety is entitled to have the property of the principal first applied to the discharge of the obligation.

History: En. Sec. 3696, Civ. C. 1895; re-en. Sec. 5693, Rev. C. 1907; re-en. Sec. 8208, R.C.M. 1921; Cal. Civ. C. Sec. 2850; Field Civ. C. Sec. 1571; re-en. Sec. 8208, R.C.M. 1935; R.C.M. 1947, 30-507.

TITLE 29

RESERVED

TITLE 30

TRADE AND COMMERCE

Uniform Commercial Code - General Provisions.
Uniform Commercial Code - Sales.
Uniform Commercial Code - Commercial Paper.
Uniform Commercial Code - Bank Deposits and Collections.
Uniform Commercial Code - Letters of Credit.
Uniform Commercial Code - Bulk Transfers.
Uniform Commercial Code - Warehouse Receipts, Bills of Lading, and Other Documents of Title.
Uniform Commercial Code - Investment Securities.
Uniform Commercial Code - Secured Transactions — Sales of Accounts, Contract Rights, and Chattel Paper.
Securities Regulation.
Sales.
Weights, Measures, Standards, and Labeling.
Assumed Business Names, Trademarks, and Related Rights.
Unfair Trade Practices and Consumer Protection.
Foreign-Trade Zones.

CHAPTER 1

UNIFORM COMMERCIAL CODE GENERAL PROVISIONS

Part 1 — Short Title, Construction, Application, and Subject Matter of the Code

tion
1-101. Short title.
1-102. Purposes — rules of construction — variation by agreement.
1-103. Supplementary general principles of law applicable.
1-104. Construction against implicit repeal.
1-105. Territorial application of the code — parties' power to choose applicable law.
1-106. Remedies to be liberally administered.
1-107. Waiver or renunciation of claim or right after breach.
1-108. Severability.
1-109. Section captions.
1-110. Provision for transition.
1-111. Laws not repealed.

Part 2 — General Definitions and Principles of Interpretation

1-201. General definitions.
1-202. Prima facie evidence by third-party documents.
1-203. Obligation of good faith.
1-204. Time — reasonable time — "seasonably".
1-205. Course of dealing and usage of trade.
1-206. Statute of frauds for kinds of personal property not otherwise covered.
1-207. Performance or acceptance under reservation of rights.
1-208. Option to accelerate at will.

Part 1

Short Title, Construction, Application, and Subject Matter of the Code

30-1-101. Short title. (1) Chapters 1 through 9 of this title shall b known and may be cited as Uniform Commercial Code.

(2) As used in chapters 1 through 9 of this title "code" means "Unifor Commercial Code" unless the context indicates otherwise.

History: En. Sec. 1-101, Ch. 264, L. 1963; amd. Sec. 12, Ch. 265, L. 1917; R.C.M. 194 87A-1-101.

30-1-102. Purposes — rules of construction — variation b agreement. (1) This code shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this code are:

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices throug custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.

(3) The effect of provisions of this code may be varied by agreement except as otherwise provided in this code and except that the obligations o good faith, diligence, reasonableness and care prescribed by this code ma not be disclaimed by agreement but the parties may by agreement determin the standards by which the performance of such obligations are to be measured if such standards are not manifestly unreasonable.

(4) The presence in certain provisions of this code of the words "unles otherwise agreed" or words of similar import does not imply that the effec of other provisions may not be varied by agreement under subsection (3).

(5) In this code unless the context otherwise requires:

(a) words in the singular number include the plural, and in the plura include the singular;

(b) words of the masculine gender include the feminine and the neuter and when the sense so indicates words of the neuter gender may refer to an gender.

History: En. Sec. 1-102, Ch. 264, L. 1963; R.C.M. 1947, 87A-1-102.

30-1-103. Supplementary general principles of law applicable Unless displaced by the particular provisions of this code, the principles o law and equity, including the law merchant and the law relative to capacit to contract, principal and agent, estoppel, fraud, misrepresentation, duress coercion, mistake, bankruptcy, or other validating or invalidating cause shal supplement its provisions.

History: En. Sec. 1-103, Ch. 264, L. 1963; R.C.M. 1947, 87A-1-103.

30-1-104. Construction against implicit repeal. This code being general code intended as a unified coverage of its subject matter, no part o it shall be deemed to be impliedly repealed by subsequent legislation if suc construction can reasonably be avoided.

History: En. Sec. 1-104, Ch. 264, L. 1963; R.C.M. 1947, 87A-1-104.

30-1-105. Territorial application of the code — parties' power o choose applicable law. (1) Except as provided hereafter in this section, vhen a transaction bears a reasonable relation to this state and also to nother state or nation the parties may agree that the law either of this state r of such other state or nation shall govern their rights and duties. Failing uch agreement this code applies to transactions bearing an appropriate relaion to this state.

(2) Where one of the following provisions of this code specifies the appliable law, that provision governs and a contrary agreement is effective only o the extent permitted by the law (including the conflict of laws rules) so pecified:

Rights of creditors against sold goods. 30-2-402.

Applicability of the Chapter on Bank Deposits and Collections. 30-4-102.

Bulk transfers subject to the Chapter on Bulk Transfers. 30-6-102.

Applicability of the Chapter on Investment Securities. 30-8-106.

Policy and scope of the Chapter on Secured Transactions. 30-9-102 and 0-9-103.

History: En. Sec. 1-105, Ch. 264, L. 1963; R.C.M. 1947, 87A-1-105.

30-1-106. Remedies to be liberally administered. (1) The remeies provided by this code shall be liberally administered to the end that the ggrieved party may be put in as good a position as if the other party had ully performed but neither consequential or special nor penal damages may e had except as specifically provided in this code or by other rule of law.

(2) Any right or obligation declared by this code is enforceable by action nless the provision declaring it specifies a different and limited effect.

History: En. Sec. 1-106, Ch. 264, L. 1963; R.C.M. 1947, 87A-1-106.

30-1-107. Waiver or renunciation of claim or right after reach. Any claim or right arising out of an alleged breach can be disharged in whole or in part without consideration by a written waiver or enunciation signed and delivered by the aggrieved party.

History: En. Sec. 1-107, Ch. 264, L. 1963; R.C.M. 1947, 87A-1-107.

30-1-108. Severability. If any provision or clause of this code or pplication thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the code which can e given effect without the invalid provision or application, and to this end he provisions of this code are declared to be severable.

History: En. Sec. 1-108, Ch. 264, L. 1963; R.C.M. 1947, 87A-1-108.

30-1-109. Section captions. Section captions are parts of this code.

History: En. Sec. 1-109, Ch. 264, L. 1963; R.C.M. 1947, 87A-1-109.

30-1-110. Provision for transition. Transactions validly entered into efore January 1, 1965, and the rights, duties and interests flowing from em remain valid thereafter and may be terminated, completed, consummated or enforced as required or permitted by any statute or other law mended or repealed by this code as though such repeal or amendment had ot occurred.

History: En. Sec. 10-102, Ch. 264, L. 1963; R.C.M. 1947, 87A-10-102.

30-1-111. Laws not repealed. The Chapter on Documents of Title (Chapter 7) does not repeal or modify any laws prescribing the form or contents of documents of title or the services or facilities to be afforded by bailees, or otherwise regulating bailees' businesses in respects not specifically dealt with herein; but the fact that such laws are violated does not affect the status of a document of title which otherwise complies with the definition of a document of title (30-1-201).

References to a "branch" or "separate office" of a bank in this code are included to preserve uniformity in a Uniform Act and are not to be construed as affecting or amending in any way the laws of this state relative to the operation of branches or separate offices of a bank.

This code does not repeal or modify any of the following provisions: 30-11-504, relating to auctioneer's memorandum of sale; 69-14-216, relating to claims against carriers for damage to livestock; or Title 18, chapter 1, part 4, inclusive, relating to contract actions against the state.

History: **En. Sec. 10-104, Ch. 264, L. 1963; R.C.M. 1947, 87A-10-103.**

Part 2

General Definitions and Principles of Interpretation

30-1-201. General definitions. Subject to additional definitions contained in the subsequent chapters of this code which are applicable to specific chapters or parts thereof, and unless the context otherwise requires, in this code:

(1) "Action" in the sense of a judicial proceeding includes recoupment, counterclaim, setoff, suit in equity and any other proceedings in which rights are determined.

(2) "Aggrieved party" means a party entitled to resort to a remedy.

(3) "Agreement" means the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this code (30-1-205 and 30-2-208). Whether an agreement has legal consequences is determined by the provisions of this code, if applicable; otherwise by the law of contracts (30-1-103).

(4) "Bank" means any person engaged in the business of banking.

(5) "Bearer" means the person in possession of an instrument, document of title, or security payable to bearer or endorsed in blank.

(6) "Bill of lading" means a document evidencing the receipt of goods for shipment issued by a person engaged in the business of transporting or forwarding goods, and includes an airbill. "Airbill" means a document serving for air transportation as a bill of lading does for marine or rail transportation, and includes an air consignment note or air waybill.

(7) "Branch" includes a separately incorporated foreign branch of a bank.

(8) "Burden of establishing" a fact means the burden of persuading the triers of fact that the existence of the fact is more probable than its nonexistence.

(9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary

urse from a person in the business of selling goods of that kind but does
ot include a pawnbroker. "Buying" may be for cash or by exchange of other
operty or on secured or unsecured credit and includes receiving goods or
ocuments of title under a preexisting contract for sale but does not include
transfer in bulk or as security for or in total or partial satisfaction of a
oney debt.

(10) "Conspicuous": A term or clause is conspicuous when it is so written
at a reasonable person against whom it is to operate ought to have noticed
A printed heading in capitals (as: Non-Negotiable Bill of Lading) is con-
icuous. Language in the body of a form is "conspicuous" if it is in larger
other contrasting type or color. But in a telegram any stated term is "con-
icuous". Whether a term or clause is "conspicuous" or not is for decision
the court.

(11) "Contract" means the total legal obligation which results from the
rties' agreement as affected by this code and any other applicable rules of
w.

(12) "Creditor" includes a general creditor, a secured creditor, a lien credi-
r and any representative of creditors, including an assignee for the benefit
creditors, a trustee in bankruptcy, a receiver in equity and an executor or
ministrator of an insolvent debtor's or assignor's estate.

(13) "Defendant" includes a person in the position of defendant in a cross-
tion or counterclaim.

(14) "Delivery" with respect to instruments, documents of title, chattel
per or securities means voluntary transfer of possession.

(15) "Document of title" includes bill of lading, dock warrant, dock
ceipt, warehouse receipt or order for the delivery of goods, and also any
her document which in the regular course of business or financing is
eated as adequately evidencing that the person in possession of it is enti-
d to receive, hold and dispose of the document and the goods it covers.
be a document of title a document must purport to be issued by or
dressed to a bailee and purport to cover goods in the bailee's possession
ich are either identified or are fungible portions of an identified mass.

(16) "Fault" means wrongful act, omission or breach.

(17) "Fungible" with respect to goods or securities means goods or securi-
s of which any unit is, by nature or usage of trade, the equivalent of any
ner like unit. Goods which are not fungible shall be deemed fungible for
purposes of this code to the extent that under a particular agreement or
cument unlike units are treated as equivalents.

(18) "Genuine" means free of forgery or counterfeiting.

(19) "Good faith" means honesty in fact in the conduct or transaction con-
ned.

20) "Holder" means a person who is in possession of a document of title
an instrument or an investment security drawn, issued or endorsed to him
to his order or to bearer or in blank.

21) To "honor" is to pay or to accept and pay, or where a credit so
gages to purchase or discount a draft complying with the terms of the
dit.

22) "Insolvency proceedings" includes any assignment for the benefit of
ditors or other proceedings intended to liquidate or rehabilitate the estate
the person involved.

(23) A person is "insolvent" who either has ceased to pay his debts in th ordinary course of business or cannot pay his debts as they become due c is insolvent within the meaning of the federal bankruptcy law.

(24) "Money" means a medium of exchange authorized or adopted by domestic or foreign government as a part of its currency.

(25) A person has "notice" of a fact when:

(a) he has actual knowledge of it; or

(b) he has received a notice or notification of it; or

(c) from all the facts and circumstances known to him at the time i question he has reason to know that it exists. A person "knows" or ha "knowledge" of a fact when he has actual knowledge of it. "Discover" c "learn" or a word or phrase of similar import refers to knowledge rather tha to reason to know. The time and circumstances under which a notice or not fication may cease to be effective are not determined by this code.

(26) A person "notifies" or "gives" a notice or notification to another b taking such steps as may be reasonably required to inform the other in ord nary course whether or not such other actually comes to know of it. A perso "receives" a notice or notification when:

(a) it comes to his attention; or

(b) it is duly delivered at the place of business through which the con tract was made or at any other place held out by him as the place for receip of such communications.

(27) Notice, knowledge or a notice or notification received by an organiza tion is effective for a particular transaction from the time when it is brough to the attention of the individual conducting that transaction, and in an event from the time when it would have been brought to his attention if th organization had exercised due diligence. An organization exercises due dili gence if it maintains reasonable routines for communicating significant infor mation to the person conducting the transaction and there is reasonabl compliance with the routines. Due diligence does not require an individua acting for the organization to communicate information unless such commu nication is part of his regular duties or unless he has reason to know of th transaction and that the transaction would be materially affected by th information.

(28) "Organization" includes a corporation, government or governmenta subdivision or agency, business trust, estate, trust, partnership or associatio two or more persons having a joint or common interest, or any other lega or commercial entity.

(29) "Party" as distinct from "third party" means a person who ha engaged in a transaction or made an agreement within this code.

(30) "Person" includes an individual or an organization.

(31) "Presumption" or "presumed" means that the trier of fact must fin the existence of the fact presumed unless and until evidence is introduce which would support a finding of its nonexistence.

(32) "Purchase" includes taking by sale, discount, negotiation, mortgag pledge, lien, issue or reissue, gift or any other voluntary transaction creatin an interest in property.

(33) "Purchaser" means a person who takes by purchase.

(34) "Remedy" means any remedial right to which an aggrieved party i entitled with or without resort to a tribunal.

35) "Representative" includes an agent, an officer of a corporation or
ociation, and a trustee, executor or administrator of an estate, or any
er person empowered to act for another.

36) "Rights" includes remedies.

37) "Security interest" means an interest in personal property or fixtures
ich secures payment or performance of an obligation. The retention or
ervation of title by a seller of goods notwithstanding shipment or delivery
the buyer (30-2-401) is limited in effect to a reservation of a "security
erest". The term also includes any interest of a buyer of accounts, chattel
er, or contract rights which is subject to Chapter 9. The special property
erest of a buyer of goods on identification of such goods to a contract for
under 30-2-401 is not a "security interest", but a buyer may also acquire
security interest" by complying with Chapter 9. Unless a lease or consign-
nt is intended as security, reservation of title thereunder is not a "security
erest" but a consignment is in any event subject to the provisions on con-
ment sales (30-2-326). Whether a lease is intended as security is to be
ermined by the facts of each case; however, (a) the inclusion of an option
purchase does not of itself make the lease one intended for security, and
an agreement that upon compliance with the terms of the lease the lessee
ll become or has the option to become the owner of the property for no
litional consideration or for a nominal consideration does make the lease
intended for security.

38) "Send" in connection with any writing or notice means to deposit in
mail or deliver for transmission by any other usual means of communica-
with postage or cost of transmission provided for and properly addressed
in the case of an instrument to an address specified thereon or otherwise
eed, or if there be none to any address reasonable under the circum-
ces. The receipt of any writing or notice within the time at which it
ld have arrived if properly sent has the effect of a proper sending.

39) "Signed" includes any symbol executed or adopted by a party with
sent intention to authenticate a writing.

0) "Surety" includes guarantor.

1) "Telegram" includes a message transmitted by radio, teletype, cable,
mechanical method of transmission, or the like.

2) "Term" means that portion of an agreement which relates to a partic-
matter.

3) "Unauthorized" signature or endorsement means one made without
al, implied or apparent authority and includes a forgery.

4) "Value". Except as otherwise provided with respect to negotiable
ruments and bank collections (30-3-303, 30-4-208 and 30-4-209) a person
s "value" for rights if he acquires them:

) in return for a binding commitment to extend credit or for the exten-
of immediately available credit whether or not drawn upon and whether
ot a charge-back is provided for in the event of difficulties in collection;

) as security for or in total or partial satisfaction of a preexisting claim;

) by accepting delivery pursuant to a preexisting contract for purchase;

(d) generally, in return for any consideration sufficient to support simple contract.

(45) “Warehouse receipt” means a receipt issued by a person engaged i the business of storing goods for hire.

(46) “Written” or “writing” includes printing, typewriting or any othe intentional reduction to tangible form.

History: **En. Sec. 1-201, Ch. 264, L. 1963; R.C.M. 1947, 87A-1-201.**

30-1-202. Prima facie evidence by third-party documents. A document in due form purporting to be a bill of lading, policy or certificat of insurance, official weigher’s or inspector’s certificate, consular invoice, o any other document authorized or required by the contract to be issued b a third party shall be prima facie evidence of its own authenticity and genuineness and of the facts stated in the document by the third party.

History: **En. Sec. 1-202, Ch. 264, L. 1963; R.C.M. 1947, 87A-1-202.**

30-1-203. Obligation of good faith. Every contract or duty withi this code imposes an obligation of good faith in its performance or enforcement.

History: **En. Sec. 1-203, Ch. 264, L. 1963; R.C.M. 1947, 87A-1-203.**

30-1-204. Time — reasonable time — “seasonably”. (1) Wheneve this code requires any action to be taken within a reasonable time, any tim which is not manifestly unreasonable may be fixed by agreement.

(2) What is a reasonable time for taking any action depends on th nature, purpose and circumstances of such action.

(3) An action is taken “seasonably” when it is taken at or within the tim agreed or if no time is agreed at or within a reasonable time.

History: **En. Sec. 1-204, Ch. 264, L. 1963; R.C.M. 1947, 87A-1-204.**

30-1-205. Course of dealing and usage of trade. (1) A course o dealing is a sequence of previous conduct between the parties to a particula transaction which is fairly to be regarded as establishing a common basis o understanding for interpreting their expressions and other conduct.

(2) A usage of trade is any practice or method of dealing having suc regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question The existence and scope of such a usage are to be proved as facts. If it i established that such a usage is embodied in a written trade code or simila writing the interpretation of the writing is for the court.

(3) A course of dealing between parties and any usage of trade in th vocation or trade in which they are engaged or of which they are or shoul be aware give particular meaning to and supplement or qualify terms of a agreement.

(4) The express terms of an agreement and an applicable course of dealing or usage of trade shall be construed wherever reasonable as consisten with each other; but when such construction is unreasonable express term control both course of dealing and usage of trade and course of dealing controls usage of trade.

(5) An applicable usage of trade in the place where any part of performance is to occur shall be used in interpreting the agreement as to that par of the performance.

(6) Evidence of a relevant usage of trade offered by one party is not dmissible unless and until he has given the other party such notice as the ourt finds sufficient to prevent unfair surprise to the latter.
History: En. Sec. 1-205, Ch. 264, L. 1963; R.C.M. 1947, 87A-1-205.

30-1-206. Statute of frauds for kinds of personal property not therwise covered. (1) Except in the cases described in subsection (2) of his section a contract for the sale of personal property is not enforceable by way of action or defense beyond $5,000 in amount or value of remedy unless here is some writing which indicates that a contract for sale has been made etween the parties at a defined or stated price, reasonably identifies the ubject matter, and is signed by the party against whom enforcement is ought or by his authorized agent.

(2) Subsection (1) of this section does not apply to contracts for the sale goods (30-2-201) nor of securities (30-8-319) nor to security agreements 0-9-203).
History: En. Sec. 1-206, Ch. 264, L. 1963; R.C.M. 1947, 87A-1-206.

30-1-207. Performance or acceptance under reservation of ghts. A party who with explicit reservation of rights performs or promises erformance or assents to performance in a manner demanded or offered by e other party does not thereby prejudice the rights reserved. Such words "without prejudice", "under protest" or the like are sufficient.
History: En. Sec. 1-207, Ch. 264, L. 1963; R.C.M. 1947, 87A-1-207.

30-1-208. Option to accelerate at will. A term providing that one rty or his successor in interest may accelerate payment or performance or quire collateral or additional collateral "at will" or "when he deems himself secure" or in words of similar import shall be construed to mean that he all have power to do so only if he in good faith believes that the prospect payment or performance is impaired. The burden of establishing lack of od faith is on the party against whom the power has been exercised.
istory: En. Sec. 1-208, Ch. 264, L. 1963; R.C.M. 1947, 87A-1-208.

CHAPTER 2

UNIFORM COMMERCIAL CODE SALES

Part 1 — Short Title, General Construction, and Subject Matter

tion

2-101. Short title.
2-102. Scope — certain security and other transactions excluded from this chapter.
2-103. Definitions and index of definitions.
2-104. Definitions — "merchant" — "between merchants" — "financing agency".
2-105. Definitions — transferability — "goods" — "future" goods — "lot" — "commercial unit".
2-106. Definitions — "contract" — "agreement" — "contract for sale" — "sale" — "present sale" — "conforming" to contract — "termination" — "cancellation".
2-107. Goods to be severed from realty — recording.

Part 2 — Form, Formation, and Readjustment of Contract

30-2-201. Formal requirements — statute of frauds.
30-2-202. Final written expression — parol or extrinsic evidence.
30-2-203. Seals inoperative.
30-2-204. Formation in general.
30-2-205. Firm offers.
30-2-206. Offer and acceptance in formation of contract.
30-2-207. Additional terms in acceptance or confirmation.
30-2-208. Course of performance or practical construction.
30-2-209. Modification, rescission, and waiver.
30-2-210. Delegation of performance — assignment of rights.

Part 3 — General Obligation and Construction of Contract

30-2-301. General obligations of parties.
30-2-302. Unconscionable contract or clause.
30-2-303. Allocation or division of risks.
30-2-304. Price payable in money, goods, realty, or otherwise.
30-2-305. Open price term.
30-2-306. Output, requirements and exclusive dealings.
30-2-307. Delivery in single lot or several lots.
30-2-308. Absence of specified place for delivery.
30-2-309. Absence of specific time provisions — notice of termination.
30-2-310. Open time for payment or running of credit — authority to ship under reservation.
30-2-311. Options and cooperation respecting performance.
30-2-312. Warranty of title and against infringement — buyer's obligation against infringement.
30-2-313. Express warranties by affirmation, promise, description, sample.
30-2-314. Implied warranty — merchantability — usage of trade.
30-2-315. Implied warranty — fitness for particular purpose.
30-2-316. Exclusion or modification of warranties.
30-2-317. Cumulation and conflict of warranties express or implied.
30-2-318. Third-party beneficiaries of warranties express or implied.
30-2-319. F.O.B. and F.A.S. terms.
30-2-320. C.I.F. and C.&F. terms.
30-2-321. C.I.F. or C.&F. — "net landed weights" — "payment on arrival" — warranty of condition on arrival.
30-2-322. Delivery "ex-ship".
30-2-323. Form of bill of lading required in overseas shipment — "overseas".
30-2-324. "No arrival, no sale" term.
30-2-325. "Letter of credit" term — "confirmed credit".
30-2-326. Sale on approval and sale or return — consignment sales and rights of creditors.
30-2-327. Special incidents of sale on approval and sale or return.

Part 4 — Title, Creditors, and Good Faith Purchasers

30-2-401. Passing of title — reservation for security — limited application of this section.
30-2-402. Rights of seller's creditors against sold goods.
30-2-403. Power to transfer — good faith purchase of goods — "entrusting".

Part 5 — Performance

30-2-501. Insurable interest in goods — manner of identification of goods.
30-2-502. Buyer's right to goods on seller's insolvency.
30-2-503. Manner of seller's tender of delivery.
30-2-504. Shipment by seller.
30-2-505. Seller's shipment under reservation.
30-2-506. Rights of financing agency.
30-2-507. Effect of seller's tender — delivery on condition.
30-2-508. Cure by seller of improper tender or delivery — replacement.
30-2-509. Risk of loss in the absence of breach.
30-2-510. Effect of breach on risk of loss.
30-2-511. Tender of payment by buyer — payment by check.

2-512. Payment by buyer before inspection.
2-513. Buyer's right to inspection of goods.
2-514. When documents deliverable on acceptance — when on payment.
2-515. Preserving evidence of goods in dispute.

Part 6 — Breach, Repudiation, and Excuse

2-601. Buyer's rights on improper delivery.
2-602. Manner and effect of rightful rejection.
2-603. Merchant buyer's duties as to rightfully rejected goods.
2-604. Buyer's options as to salvage of rightfully rejected goods.
2-605. Waiver of buyer's objections by failure to particularize.
2-606. What constitutes acceptance of goods.
2-607. Effect of acceptance — notice of breach — burden of establishing breach after acceptance — notice of claim or litigation to person answerable over.
2-608. Revocation of acceptance in whole or in part.
2-609. Right to adequate assurance of performance.
2-610. Anticipatory repudiation.
2-611. Retraction of anticipatory repudiation.
2-612. "Installment contract" — breach.
2-613. Casualty to identified goods.
2-614. Substituted performance.
2-615. Excuse by failure of presupposed conditions.
2-616. Procedure on notice claiming excuse.

Part 7 — Remedies

2-701. Remedies for breach of collateral contracts not impaired.
2-702. Seller's remedies on discovery of buyer's insolvency.
2-703. Seller's remedies in general.
2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods.
2-705. Seller's stoppage of delivery in transit or otherwise.
2-706. Seller's resale including contract for resale.
2-707. "Person in the position of a seller".
2-708. Seller's damages for nonacceptance or repudiation.
2-709. Action for the price.
2-710. Seller's incidental damages.
2-711. Buyer's remedies in general — buyer's security interest in rejected goods.
2-712. "Cover" — buyer's procurement of substitute goods.
2-713. Buyer's damages for nondelivery or repudiation.
2-714. Buyer's damages for breach in regard to accepted goods.
2-715. Buyer's incidental and consequential damages.
2-716. Buyer's right to specific performance or recovery of goods.
2-717. Deduction of damages from the price.
2-718. Liquidation or limitation of damages — deposits.
2-719. Contractual modification or limitation of remedy.
2-720. Effect of "cancellation" or "rescission" on claims for antecedent breach.
2-721. Remedies for fraud.
2-722. Who can sue third parties for injury to goods.
2-723. Proof of market price — time and place.
2-724. Admissibility of market quotations.
2-725. Statute of limitations in contracts for sale.

Part 1

Short Title, General Construction, and Subject Matter

30-2-101. Short title. This chapter shall be known and may be cited a Uniform Commercial Code—Sales.

istory: **En. Sec. 2-101, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-101.**

30-2-102. Scope — certain security and other transaction excluded from this chapter. Unless the context otherwise requires, thi chapter applies to transactions in goods; it does not apply to any transactio which although in the form of an unconditional contract to sell or presen sale is intended to operate only as a security transaction nor does this chap ter impair or repeal any statute regulating sales to consumers, farmers o other specified classes of buyers.

History: En. Sec. 2-102, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-102.

30-2-103. Definitions and index of definitions. (1) In this chapte unless the context otherwise requires:

(a) "Buyer" means a person who buys or contracts to buy goods.

(b) "Good faith" in the case of a merchant means honesty in fact and th observance of reasonable commercial standards of fair dealing in the trade.

(c) "Receipt" of goods means taking physical possession of them.

(d) "Seller" means a person who sells or contracts to sell goods.

(2) Other definitions applying to this chapter or to specified part thereof, and the sections in which they appear are:

"Acceptance". 30-2-606.
"Banker's credit". 30-2-325.
"Between merchants". 30-2-104.
"Cancellation". 30-2-106(4).
"Commercial unit". 30-2-105.
"Confirmed credit". 30-2-325.
"Conforming to contract". 30-2-106.
"Contract for sale". 30-2-106.
"Cover". 30-2-712.
"Entrusting". 30-2-403.
"Financing agency". 30-2-104.
"Future goods". 30-2-105.
"Goods". 30-2-105.
"Identification". 30-2-501.
"Installment contract". 30-2-612.
"Letter of credit". 30-2-325.
"Lot". 30-2-105.
"Merchant". 30-2-104.
"Overseas". 30-2-323.
"Person in position of seller". 30-2-707.
"Present sale". 30-2-106.
"Sale". 30-2-106.
"Sale on approval". 30-2-326.
"Sale or return". 30-2-326.
"Termination". 30-2-106.

(3) The following definitions in other chapters apply to this chapter:

"Check". 30-3-104.
"Consignee". 30-7-102.
"Consignor". 30-7-102.
"Consumer goods". 30-9-109.
"Dishonor". 30-3-507.
"Draft". 30-3-104.

(4) In addition Chapter 1 contains general definitions and principles of nstruction and interpretation applicable throughout this chapter.

istory: En. Sec. 2-103, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-103.

30-2-104. Definitions — “merchant” — “between merchants” — nancing agency”. (1) “Merchant” means a person who deals in goods of kind or otherwise by his occupation holds himself out as having knowlge or skill peculiar to the practices or goods involved in the transaction or whom such knowledge or skill may be attributed by his employment of an ent or broker or other intermediary who by his occupation holds himself t as having such knowledge or skill.

2) “Financing agency” means a bank, finance company or other person o in the ordinary course of business makes advances against goods or cuments of title or who by arrangement with either the seller or the buyer ervenes in ordinary course to make or collect payment due or claimed der the contract for sale, as by purchasing or paying the seller’s draft or king advances against it or by merely taking it for collection whether or documents of title accompany the draft. “Financing agency” includes also ank or other person who similarly intervenes between persons who are in position of seller and buyer in respect to the goods (30-2-707).

3) “Between merchants” means in any transaction with respect to which h parties are chargeable with the knowledge or skill of merchants.

istory: En. Sec. 2-104, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-104.

0-2-105. Definitions — transferability — “goods” — “future” ods — “lot” — “commercial unit”. (1) “Goods” means all things cluding specially manufactured goods) which are movable at the time of ntification to the contract for sale other than the money in which the ce is to be paid, investment securities (Chapter 8) and things in action. oods” also includes the unborn young of animals and growing crops and er identified things attached to realty as described in the section on goods e severed from realty (30-2-107).

2) Goods must be both existing and identified before any interest in m can pass. Goods which are not both existing and identified are “future” ds. A purported present sale of future goods or of any interest therein rates as a contract to sell.

3) There may be a sale of a part interest in existing identified goods.

4) An undivided share in an identified bulk of fungible goods is suffintly identified to be sold although the quantity of the bulk is not deterned. Any agreed proportion of such a bulk or any quantity thereof agreed n by number, weight or other measure may to the extent of the seller’s rest in the bulk be sold to the buyer who then becomes an owner in comn.

5) “Lot” means a parcel or a single article which is the subject matter separate sale or delivery, whether or not it is sufficient to perform the tract.

6) “Commercial unit” means such a unit of goods as by commercial ge is a single whole for purposes of sale and division of which materially

impairs its character or value on the market or in use. A commercial uni may be a single article (as a machine) or a set of articles (as a suite of furniture or an assortment of sizes) or a quantity (as a bale, gross, or carload) o any other unit treated in use or in the relevant market as a single whole.

History: En. Sec. 2-105, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-105.

30-2-106. Definitions — "contract" — "agreement" — "contrac for sale" — "sale" — "present sale" — "conforming" to contract — "termination" — "cancellation". (1) In this chapter unless the contex otherwise requires "contract" and "agreement" are limited to those relatin to the present or future sale of goods. "Contract for sale" includes both present sale of goods and a contract to sell goods at a future time. A "sale" consists in the passing of title from the seller to the buyer for a pric (30-2-401). A "present sale" means a sale which is accomplished by th making of the contract.

(2) Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.

(3) "Termination" occurs when either party pursuant to a power create by agreement or law puts an end to the contract otherwise than for it breach. On "termination" all obligations which are still executory on bot sides are discharged but any right based on prior breach or performance survives.

(4) "Cancellation" occurs when either party puts an end to the contrac for breach by the other and its effect is the same as that of "termination" except that the canceling party also retains any remedy for breach of th whole contract or any unperformed balance.

History: En. Sec. 2-106, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-106.

30-2-107. Goods to be severed from realty — recording. (1) A contract for the sale of timber, minerals or the like or a structure or its materials to be removed from realty is a contract for the sale of goods within thi chapter if they are to be severed by the seller but until severance a purported present sale thereof which is not effective as a transfer of an interes in land is effective only as a contract to sell.

(2) A contract for the sale apart from the land of growing crops or othe things attached to realty and capable of severance without material harm thereto but not described in subsection (1) is a contract for the sale of good within this chapter whether the subject matter is to be severed by the buye or by the seller even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale befor severance.

(3) The provisions of this section are subject to any third-party right provided by the law relating to realty records, and the contract for sale ma be executed and recorded as a document transferring an interest in land an shall then constitute notice to third parties of the buyer's rights under th contract for sale.

History: En. Sec. 2-107, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-107.

Part 2

Form, Formation, and Readjustment of Contract

30-2-201. Formal requirements — statute of frauds. (1) Except
otherwise provided in this section a contract for the sale of goods for the
ice of $500 or more is not enforceable by way of action or defense unless
ere is some writing sufficient to indicate that a contract for sale has been
ade between the parties and signed by the party against whom enforcement
sought or by his authorized agent or broker. A writing is not insufficient
cause it omits or incorrectly states a term agreed upon but the contract is
t enforceable under this paragraph beyond the quantity of goods shown in
ch writing.

(2) Between merchants if within a reasonable time a writing in confirma-
n of the contract and sufficient against the sender is received and the
rty receiving it has reason to know its contents, it satisfies the require-
nts of subsection (1) against such party unless written notice of objection
its contents is given within 10 days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1)
t which is valid in other respects is enforceable:

(a) if the goods are to be specially manufactured for the buyer and are
t suitable for sale to others in the ordinary course of the seller's business
d the seller, before notice of repudiation is received and under circum-
nces which reasonably indicate that the goods are for the buyer, has made
her a substantial beginning of their manufacture or commitments for their
ocurement; or

(b) if the party against whom enforcement is sought admits in his plead-
, testimony or otherwise in court that a contract for sale was made, but
contract is not enforceable under this provision beyond the quantity of
ods admitted; or

(c) with respect to goods for which payment has been made and accepted
which have been received and accepted (30-2-606).

istory: En. Sec. 2-201, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-201.

**30-2-202. Final written expression — parol or extrinsic evi-
nce.** Terms with respect to which the confirmatory memoranda of the par-
s agree or which are otherwise set forth in a writing intended by the
ties as a final expression of their agreement with respect to such terms
are included therein may not be contradicted by evidence of any prior
eement or of a contemporaneous oral agreement but may be explained or
plemented:

(a) by course of dealing or usage of trade (30-1-205) or by course of per-
mance (30-2-208); and

(b) by evidence of consistent additional terms unless the court finds the
ting to have been intended also as a complete and exclusive statement of
terms of the agreement.

istory: En. Sec. 2-202, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-202.

30-2-203. Seals inoperative. The affixing of a seal to a writing evi-
cing a contract for sale or an offer to buy or sell goods does not constitute

the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

History: En. Sec. 2-203, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-203.

30-2-204. Formation in general. (1) A contract for sale of goods ma be made in any manner sufficient to show agreement, including conduct b both parties which recognizes the existence of such a contract.

(2) An agreement sufficient to constitute a contract for sale may be foun even though the moment of its making is undetermined.

(3) Even though one or more terms are left open a contract for sale doe not fail for indefiniteness if the parties have intended to make a contract an there is a reasonably certain basis for giving an appropriate remedy.

History: En. Sec. 2-204, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-204.

30-2-205. Firm offers. An offer by a merchant to buy or sell goods i a signed writing which by its terms gives assurance that it will be held ope is not revocable, for lack of consideration, during the time stated or if n time is stated for a reasonable time, but in no event may such period o irrevocability exceed 3 months; but any such term of assurance on a for supplied by the offeree must be separately signed by the offeror.

History: En. Sec. 2-205, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-205.

30-2-206. Offer and acceptance in formation of contract. (1 Unless otherwise unambiguously indicated by the language or circumstances:

(a) an offer to make a contract shall be construed as inviting acceptanc in any manner and by any medium reasonable in the circumstances;

(b) an order or other offer to buy goods for prompt or current shipmen shall be construed as inviting acceptance either by a prompt promise to shi or by the prompt or current shipment of conforming or nonconforming goods but such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offere only as an accommodation to the buyer.

(2) Where the beginning of a requested performance is a reasonable mod of acceptance an offeror who is not notified of acceptance within a reasonabl time may treat the offer as having lapsed before acceptance.

History: En. Sec. 2-206, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-206.

30-2-207. Additional terms in acceptance or confirmation. (1) definite and seasonable expression of acceptance or a written confirmatio which is sent within a reasonable time operates as an acceptance even thoug it states terms additional to or different from those offered or agreed upon unless acceptance is expressly made conditional on assent to the additiona or different terms.

(2) The additional terms are to be construed as proposals for addition t the contract. Between merchants such terms become part of the contrac unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is give within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract sufficient to establish a contract for sale although the writings of the par- es do not otherwise establish a contract. In such case the terms of the par- cular contract consist of those terms on which the writings of the parties gree, together with any supplementary terms incorporated under any other ovisions of this code.

History: En. Sec. 2-207, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-207.

30-2-208. Course of performance or practical construction. (1) here the contract for sale involves repeated occasions for performance by ther party with knowledge of the nature of the performance and oppor- nity for objection to it by the other, any course of performance accepted acquiesced in without objection shall be relevant to determine the mean- g of the agreement.

(2) The express terms of the agreement and any such course of perfor- ance, as well as any course of dealing and usage of trade, shall be construed henever reasonable as consistent with each other; but when such construc- on is unreasonable, express terms shall control course of performance and urse of performance shall control both course of dealing and usage of trade 0-1-205).

(3) Subject to the provisions of the next section on modification and aiver, such course of performance shall be relevant to show a waiver or odification of any term inconsistent with such course of performance.

History: En. Sec. 2-208, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-208.

30-2-209. Modification, rescission and waiver. (1) An agreement odifying a contract within this chapter needs no consideration to be bind- g.

(2) A signed agreement which excludes modification or rescission except a signed writing cannot be otherwise modified or rescinded, but except as tween merchants such a requirement on a form supplied by the merchant ust be separately signed by the other party.

(3) The requirements of the statute of frauds section of this chapter 0-2-201) must be satisfied if the contract as modified is within its provi- ons.

(4) Although an attempt at modification or rescission does not satisfy the quirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the ntract may retract the waiver by reasonable notification received by the her party that strict performance will be required of any term waived, less the retraction would be unjust in view of a material change of position reliance on the waiver.

istory: En. Sec. 2-209, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-209.

30-2-210. Delegation of performance — assignment of rights. A party may perform his duty through a delegate unless otherwise agreed unless the other party has a substantial interest in having his original omisor perform or control the acts required by the contract. No delegation performance relieves the party delegating of any duty to perform or any bility for breach.

(2) Unless otherwise agreed all rights of either seller or buyer can b assigned except where the assignment would materially change the duty o the other party, or increase materially the burden or risk imposed on him b his contract, or impair materially his chance of obtaining return performance A right to damages for breach of the whole contract or a right arising ou of the assignor's due performance of his entire obligation can be assigne despite agreement otherwise.

(3) Unless the circumstances indicate the contrary a prohibition of assignment of "the contract" is to be construed as barring only the delegation t the assignee of the assignor's performance.

(4) An assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of right and unless the language or the circumstances (as in an assignment for security) indicate the contrary, it is a delegation of performance of the duties o the assignor and its acceptance by the assignee constitutes a promise by hin to perform those duties. This promise is enforceable by either the assigno or the other party to the original contract.

(5) The other party may treat any assignment which delegates performance as creating reasonable grounds for insecurity and may without prejudice to his rights against the assignor demand assurances from the assigne (30-2-609).

History: **En. Sec. 2-210, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-210.**

Part 3

General Obligation and Construction of Contract

30-2-301. General obligations of parties. The obligation of th seller is to transfer and deliver and that of the buyer is to accept and pa in accordance with the contract.

History: **En. Sec. 2-301, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-301.**

30-2-302. Unconscionable contract or clause. (1) If the court as matter of law finds the contract or any clause of the contract to have bee unconscionable at the time it was made the court may refuse to enforce th contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionabl clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or an clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpos and effect to aid the court in making the determination.

History: **En. Sec. 2-302, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-302.**

30-2-303. Allocation or division of risks. Where this chapter allocates a risk or a burden as between the parties "unless otherwise agreed", th agreement may not only shift the allocation but may also divide the risk o burden.

History: **En. Sec. 2-303, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-303.**

30-2-304. Price payable in money, goods, realty, or otherwise. 1) The price can be made payable in money or otherwise. If it is payable n whole or in part in goods each party is a seller of the goods which he is o transfer.

(2) Even though all or part of the price is payable in an interest in realty he transfer of the goods and the seller's obligations with reference to them re subject to this chapter, but not the transfer of the interest in realty or he transferor's obligations in connection therewith.

History: En. Sec. 2-304, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-304.

30-2-305. Open price term. (1) The parties if they so intend can conlude a contract for sale even though the price is not settled. In such a case he price is a reasonable price at the time for delivery if:

(a) nothing is said as to price; or

(b) the price is left to be agreed by the parties and they fail to agree; or

(c) the price is to be fixed in terms of some agreed market or other stanard as set or recorded by a third person or agency and it is not so set or ecorded.

(2) A price to be fixed by the seller or by the buyer means a price for im to fix in good faith.

(3) When a price left to be fixed otherwise than by agreement of the pares fails to be fixed through fault of one party the other may at his option reat the contract as canceled or himself fix a reasonable price.

(4) Where, however, the parties intend not to be bound unless the price e fixed or agreed and it is not fixed or agreed there is no contract. In such case the buyer must return any goods already received or if unable so to o must pay their reasonable value at the time of delivery and the seller ust return any portion of the price paid on account.

History: En. Sec. 2-305, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-305.

30-2-306. Output, requirements and exclusive dealings. (1) A erm which measures the quantity by the output of the seller or the requireents of the buyer means such actual output or requirements as may occur n good faith, except that no quantity unreasonably disproportionate to any ated estimate or in the absence of a stated estimate to any normal or otherise comparable prior output or requirements may be tendered or demanded.

(2) A lawful agreement by either the seller or the buyer for exclusive ealing in the kind of goods concerned imposes unless otherwise agreed an bligation by the seller to use best efforts to supply the goods and by the uyer to use best efforts to promote their sale.

History: En. Sec. 2-306, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-306.

30-2-307. Delivery in single lot or several lots. Unless otherwise greed all goods called for by a contract for sale must be tendered in a single elivery and payment is due only on such tender but where the circumances give either party the right to make or demand delivery in lots the rice if it can be apportioned may be demanded for each lot.

History: En. Sec. 2-307, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-307.

30-2-308. Absence of specified place for delivery. Unless otherise agreed:

(a) the place for delivery of goods is the seller's place of business or if he has none his residence; but

(b) in a contract for sale of identified goods which to the knowledge of the parties at the time of contracting are in some other place, that place is the place for their delivery; and

(c) documents of title may be delivered through customary banking channels.

History: En. Sec. 2-308, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-308.

30-2-309. Absence of specific time provisions — notice of termination. (1) The time for shipment or delivery or any other action under a contract if not provided in this chapter or agreed upon shall be a reasonable time.

(2) Where the contract provides for successive performances but is indefinite in duration it is valid for a reasonable time but unless otherwise agreed may be terminated at any time by either party.

(3) Termination of a contract by one party except on the happening of an agreed event requires that reasonable notification be received by the other party and an agreement dispensing with notification is invalid if its operation would be unconscionable.

History: En. Sec. 2-309, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-309.

30-2-310. Open time for payment or running of credit — authority to ship under reservation. Unless otherwise agreed:

(a) payment is due at the time and place at which the buyer is to receive the goods even though the place of shipment is the place of delivery; and

(b) if the seller is authorized to send the goods he may ship them under reservation, and may tender the documents of title, but the buyer may inspect the goods after their arrival before payment is due unless such inspection is inconsistent with the terms of the contract (30-2-513); and

(c) if delivery is authorized and made by way of documents of title otherwise than by subsection (b) then payment is due at the time and place at which the buyer is to receive the documents regardless of where the goods are to be received; and

(d) where the seller is required or authorized to ship the goods on credit the credit period runs from the time of shipment but postdating the invoice or delaying its dispatch will correspondingly delay the starting of the credit period.

History: En. Sec. 2-310, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-310.

30-2-311. Options and cooperation respecting performance. (1) An agreement for sale which is otherwise sufficiently definite (subsection (3) of 30-2-204) to be a contract is not made invalid by the fact that it leaves particulars of performance to be specified by one of the parties. Any such specification must be made in good faith and within limits set by commercial reasonableness.

(2) Unless otherwise agreed specifications relating to assortment of the goods are at the buyer's option and except as otherwise provided in subsections (1)(c) and (3) of 30-2-319 specifications or arrangements relating to shipment are at the seller's option.

(3) Where such specification would materially affect the other party's erformance but is not seasonably made or where one party's cooperation is ecessary to the agreed performance of the other but is not seasonably forthming, the other party in addition to all other remedies:

(a) is excused for any resulting delay in his own performance; and

(b) may also either proceed to perform in any reasonable manner or after e time for a material part of his own performance treat the failure to specy or to cooperate as a breach by failure to deliver or accept the goods.

History: En. Sec. 2-311, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-311.

30-2-312. Warranty of title and against infringement — buyer's bligation against infringement. (1) Subject to subsection (2) there is in contract for sale a warranty by the seller that:

(a) the title conveyed shall be good, and its transfer rightful; and

(b) the goods shall be delivered free from any security interest or other en or encumbrance of which the buyer at the time of contracting has no nowledge.

(2) A warranty under subsection (1) will be excluded or modified only by ecific language or by circumstances which give the buyer reason to know at the person selling does not claim title in himself or that he is purporting sell only such right or title as he or a third person may have.

(3) Unless otherwise agreed a seller who is a merchant regularly dealing goods of the kind warrants that the goods shall be delivered free of the ghtful claim of any third person by way of infringement or the like but a uyer who furnishes specifications to the seller must hold the seller harmless gainst any such claim which arises out of compliance with the specifications.

History: En. Sec. 2-312, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-312.

30-2-313. Express warranties by affirmation, promise, descripion, sample. (1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer hich relates to the goods and becomes part of the basis of the bargain cretes an express warranty that the goods shall conform to the affirmation or romise.

(b) Any description of the goods which is made part of the basis of the argain creates an express warranty that the goods shall conform to the escription.

(c) Any sample or model which is made part of the basis of the bargain reates an express warranty that the whole of the goods shall conform to the mple or model.

(2) It is not necessary to the creation of an express warranty that the eller use formal words such as "warrant" or "guarantee" or that he have a ecific intention to make a warranty, but an affirmation merely of the value the goods or a statement purporting to be merely the seller's opinion or mmendation of the goods does not create a warranty.

History: En. Sec. 2-313, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-313.

30-2-314. Implied warranty — merchantability — usage of rade. (1) Unless excluded or modified (30-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller i a merchant with respect to goods of that kind. Under this section the servin for value of food or drink to be consumed either on the premises or elsewher is a sale.

(2) Goods to be merchantable must be at least such as:

(a) pass without objection in the trade under the contract description and

(b) in the case of fungible goods, are of fair average quality within th description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the containe or label if any.

(3) Unless excluded or modified (30-2-316) other implied warranties may arise from course of dealing or usage of trade.

History: En. Sec. 2-314, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-314.

30-2-315. Implied warranty — fitness for particular purpose. Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

History: En. Sec. 2-315, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-315.

30-2-316. Exclusion or modification of warranties. (1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this chapter on parol or extrinsic evidence (30-2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2):

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of aling or course of performance or usage of trade; and

(d) in sales of cattle, hogs, sheep, and horses, there are no implied warnties, as defined in this chapter, that the cattle, hogs, sheep, or horses are ee from sickness or disease.

(4) Remedies for breach of warranty can be limited in accordance with e provisions of this chapter on liquidation or limitation of damages and on ntractual modification of remedy (30-2-718 and 30-2-719).

History: **En. Sec. 2-316, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-316; amd. Sec. 1, Ch. 95, L. 1979.**

30-2-317. Cumulation and conflict of warranties express or plied. Warranties whether express or implied shall be construed as constent with each other and as cumulative, but if such construction is unreanable the intention of the parties shall determine which warranty is ominant. In ascertaining that intention the following rules apply:

(a) Exact or technical specifications displace an inconsistent sample or odel or general language of description.

(b) A sample from an existing bulk displaces inconsistent general lanage of description.

(c) Express warranties displace inconsistent implied warranties other than implied warranty of fitness for a particular purpose.

History: **En. Sec. 2-317, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-317.**

30-2-318. Third-party beneficiaries of warranties express or plied. A seller's warranty whether express or implied extends to any natul person who is in the family or household of his buyer or who is a guest his home if it is reasonable to expect that such person may use, consume be affected by the goods and who is injured in person by breach of the rranty. A seller may not exclude or limit the operation of this section.

History: **En. Sec. 2-318, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-318.**

30-2-319. F.O.B. and F.A.S. terms. (1) Unless otherwise agreed the m F.O.B. (which means "free on board") at a named place, even though ed only in connection with the stated price, is a delivery term under which:

(a) when the term is F.O.B. the place of shipment, the seller must at that ace ship the goods in the manner provided in this chapter (30-2-504) and ar the expense and risk of putting them into the possession of the carrier;

(b) when the term is F.O.B. the place of destination, the seller must at own expense and risk transport the goods to that place and there tender livery of them in the manner provided in this chapter (30-2-503);

(c) when under either (a) or (b) the term is also F.O.B. vessel, car or ner vehicle, the seller must in addition at his own expense and risk load goods on board. If the term is F.O.B. vessel the buyer must name the ssel and in an appropriate case the seller must comply with the provisions this chapter on the form of bill of lading (30-2-323).

(2) Unless otherwise agreed the term F.A.S. vessel (which means "free ngside") at a named port, even though used only in connection with the ted price, is a delivery term under which the seller must:

(a) at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer; and

(b) obtain and tender a receipt for the goods in exchange for which the carrier is under a duty to issue a bill of lading.

(3) Unless otherwise agreed in any case falling within subsection (1)(a) or (c) or subsection (2) the buyer must seasonably give any needed instructions for making delivery, including when the term is F.A.S. or F.O.B. the loading berth of the vessel and in an appropriate case its name and sailing date. The seller may treat the failure of needed instructions as a failure of cooperation under this chapter (30-2-311). He may also at his option move the goods in any reasonable manner preparatory to delivery or shipment.

(4) Under the term F.O.B. vessel or F.A.S. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

History: En. Sec. 2-319, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-319.

30-2-320. C.I.F. and C.&F. terms. (1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C.&F. or C.F. means that the price so includes cost and freight to the named destination.

(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to:

(a) put the goods into the possession of a carrier at the port for shipment and obtain a negotiable bill or bills of lading covering the entire transportation to the named destination; and

(b) load the goods and obtain a receipt from the carrier (which may be contained in the bill of lading) showing that the freight has been paid or provided for; and

(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance; and

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any endorsement necessary to perfect the buyer's rights.

(3) Unless otherwise agreed the term C.&F. or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.

(4) Under the term C.I.F. or C.&F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.

History: En. Sec. 2-320, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-320.

30-2-321. C.I.F. or C.&F. — "net landed weights" — "payment n arrival" — warranty of condition on arrival. Under a contract coning a term C.I.F. or C.&F.:

(1) Where the price is based on or is to be adjusted according to "net nded weights", "delivered weights", "out turn" quantity or quality or the ke, unless otherwise agreed the seller must reasonably estimate the price. he payment due on tender of the documents called for by the contract is e amount so estimated, but after final adjustment of the price a settlement ust be made with commercial promptness.

(2) An agreement described in subsection (1) or any warranty of quality condition of the goods on arrival places upon the seller the risk of ordiary deterioration, shrinkage and the like in transportation but has no effect the place or time of identification to the contract for sale or delivery or the passing of the risk of loss.

(3) Unless otherwise agreed where the contract provides for payment on after arrival of the goods the seller must before payment allow such preminary inspection as is feasible; but if the goods are lost delivery of the ocuments and payment are due when the goods should have arrived.

History: **En. Sec. 2-321, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-321.**

30-2-322. Delivery "ex-ship". (1) Unless otherwise agreed a term for elivery of goods "ex-ship" (which means from the carrying vessel) or in quivalent language is not restricted to a particular ship and requires delivy from a ship which has reached a place at the named port of destination here goods of the kind are usually discharged.

(2) Under such a term unless otherwise agreed:

(a) the seller must discharge all liens arising out of the carriage and fursh the buyer with a direction which puts the carrier under a duty to deliver e goods; and

(b) the risk of loss does not pass to the buyer until the goods leave the ip's tackle or are otherwise properly unloaded.

History: **En. Sec. 2-322, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-322.**

30-2-323. Form of bill of lading required in overseas shipment "overseas". (1) Where the contract contemplates overseas shipment and ntains a term C.I.F. or C.&F. or F.O.B. vessel, the seller unless otherwise greed must obtain a negotiable bill of lading stating that the goods have en loaded on board or, in the case of a term C.I.F. or C.&F., received for ipment.

(2) Where in a case within subsection (1) a bill of lading has been issued a set of parts, unless otherwise agreed if the documents are not to be sent om abroad the buyer may demand tender of the full set; otherwise only one rt of the bill of lading need be tendered. Even if the agreement expressly quires a full set:

(a) due tender of a single part is acceptable within the provisions of this apter on cure of improper delivery (subsection (1) of 30-2-508); and

(b) even though the full set is demanded, if the documents are sent from road the person tendering an incomplete set may nevertheless require payent upon furnishing an indemnity which the buyer in good faith deems lequate.

(3) A shipment by water or by air or a contract contemplating such shipment is "overseas" insofar as by usage of trade or agreement it is subject to the commercial, financing or shipping practices characteristic of international deep water commerce.

History: En. Sec. 2-323, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-323.

30-2-324. "No arrival, no sale" term. Under a term "no arrival, no sale" or terms of like meaning, unless otherwise agreed:

(a) the seller must properly ship conforming goods and if they arrive by any means he must tender them on arrival but he assumes no obligation that the goods will arrive unless he has caused the nonarrival; and

(b) where without fault of the seller the goods are in part lost or have so deteriorated as no longer to conform to the contract or arrive after the contract time, the buyer may proceed as if there has been casualty to identified goods (30-2-613).

History: En. Sec. 2-324, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-324.

30-2-325. "Letter of credit" term — "confirmed credit". (1) Failure of the buyer seasonably to furnish an agreed letter of credit is a breach of the contract for sale.

(2) The delivery to seller of a proper letter of credit suspends the buyer's obligation to pay. If the letter of credit is dishonored, the seller may on seasonable notification to the buyer require payment directly from him.

(3) Unless otherwise agreed the term "letter of credit" or "banker's credit" in a contract for sale means an irrevocable credit issued by a financing agency of good repute and, where the shipment is overseas, of good international repute. The term "confirmed credit" means that the credit must also carry the direct obligation of such an agency which does business in the seller's financial market.

History: En. Sec. 2-325, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-325.

30-2-326. Sale on approval and sale or return — consignment sales and rights of creditors. (1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:

(a) a "sale on approval" if the goods are delivered primarily for use; and

(b) a "sale or return" if the goods are delivered primarily for resale.

(2) Except as provided in subsection (3), goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Where goods are delivered to a person for sale and such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as "on consignment" or "on memorandum". However, this subsection is not applicable if the person making delivery:

(a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign; or

(b) establishes that the person conducting the business is generally known y his creditors to be substantially engaged in selling the goods of others; or

(c) complies with the filing provisions of the Chapter on Secured Trans- tions (Chapter 9).

(4) Any "or return" term of a contract for sale is to be treated as a sep- ate contract for sale within the statute of frauds section of this chapter 0-2-201) and as contradicting the sale aspect of the contract within the ovisions of this chapter on parol or extrinsic evidence (30-2-202).

History: En. Sec. 2-326, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-326.

30-2-327. Special incidents of sale on approval and sale or eturn. (1) Under a sale on approval unless otherwise agreed:

(a) although the goods are identified to the contract the risk of loss and e title do not pass to the buyer until acceptance; and

(b) use of the goods consistent with the purpose of trial is not acceptance ut failure seasonably to notify the seller of election to return the goods is ceptance, and if the goods conform to the contract acceptance of any part acceptance of the whole; and

(c) after due notification of election to return, the return is at the seller's sk and expense but a merchant buyer must follow any reasonable instruc- ons.

(2) Under a sale or return unless otherwise agreed:

(a) the option to return extends to the whole or any commercial unit of e goods while in substantially their original condition, but must be exer- sed seasonably; and

(b) the return is at the buyer's risk and expense.

History: En. Sec. 2-327, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-327.

Part 4

Title, Creditors, and Good Faith Purchasers

30-2-401. Passing of title — reservation for security — limited pplication of this section. Each provision of this chapter with regard to e rights, obligations and remedies of the seller, the buyer, purchasers or her third parties applies irrespective of title to the goods except where the ovision refers to such title. Insofar as situations are not covered by the her provisions of this chapter and matters concerning title become material e following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their entification to the contract (30-2-501), and unless otherwise explicitly reed the buyer acquires by their identification a special property as limited this code. Any retention or reservation by the seller of the title (property) goods shipped or delivered to the buyer is limited in effect to a reservation a security interest. Subject to these provisions and to the provisions of the napter on Secured Transactions (Chapter 9), title to goods passes from the ller to the buyer in any manner and on any conditions explicitly agreed on the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time d place at which the seller completes his performance with reference to the

physical delivery of the goods, despite any reservation of a security interes and even though a document of title is to be delivered at a different tim or place; and in particular and despite any reservation of a security interes by the bill of lading:

(a) if the contract requires or authorizes the seller to send the goods t the buyer but does not require him to deliver them at destination, titl passes to the buyer at the time and place of shipment; but

(b) if the contract requires delivery at destination, title passes on tende there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a document of title, title passes at the tim when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and n documents are to be delivered, title passes at the time and place of contracting.

(4) For transactions involving interstate shipment of cattle the seller ma issue a regular title or bill of sale, or give a conditional transfer of title o bill of sale. The conditional transfer of title or bill of sale is fully validate and the title passes when the following conditions are met:

(a) the bank on which the buyer's warrant, check, or draft was drawı notifies the seller, or his designated bank, that the instrument of paymen has cleared the bank for payment, and

(b) a copy of the notification from the buyer's bank is attached to th conditional transfer of title or bill of sale.

(5) A rejection or other refusal by the buyer to receive or retain th goods, whether or not justified, or a justified revocation of acceptance revest title to the goods in the seller. Such revesting occurs by operation of law an is not a "sale".

History: En. Sec. 2-401, Ch. 264, L. 1963; amd. Sec. 1, Ch. 130, L. 1975; R.C.M. 194 87A-2-401.

30-2-402. Rights of seller's creditors against sold goods. (1 Except as provided in subsections (2) and (3), rights of unsecured creditor of the seller with respect to goods which have been identified to a contrac for sale are subject to the buyer's rights to recover the goods under thi chapter (30-2-502 and 30-2-716).

(2) A creditor of the seller may treat a sale or an identification of good to a contract for sale as void if as against him a retention of possession b the seller is fraudulent under any rule of law of the state where the good are situated, except that retention of possession in good faith and curren course of trade by a merchant-seller for a commercially reasonable time afte a sale or identification is not fraudulent.

(3) Nothing in this chapter shall be deemed to impair the rights of creditors of the seller:

(a) under the provisions of the Chapter on Secured Transactions (Chapte 9); or

(b) where identification to the contract or delivery is made not in curren course of trade but in satisfaction of or as security for a preexisting claim fc money, security or the like and is made under circumstances which unde y rule of law of the state where the goods are situated would apart from is chapter constitute the transaction a fraudulent transfer or voidable eference.

History: En. Sec. 2-402, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-402.

30-2-403. Power to transfer — good faith purchase of goods — ntrusting". (1) A purchaser of goods acquires all title which his transferor d or had power to transfer except that a purchaser of a limited interest quires rights only to the extent of the interest purchased. A person with idable title has power to transfer a good title to a good faith purchaser for lue. When goods have been delivered under a transaction of purchase the rchaser has such power even though:

(a) the transferor was deceived as to the identity of the purchaser;

(b) the delivery was in exchange for a check which is later dishonored;

(c) it was agreed that the transaction was to be a "cash sale"; or

(d) the delivery was procured through fraud punishable as theft under e criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in ods of that kind gives him power to transfer all rights of the entruster to buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention possession regardless of any condition expressed between the parties to the livery or acquiescence and regardless of whether the procurement of the trusting or the possessor's disposition of the goods has been such as to con- tute theft under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are gov- ned by the chapters on secured transactions (chapter 9), bulk transfers hapter 6) and documents of title (chapter 7).

History: En. Sec. 2-403, Ch. 264, L. 1963; amd. Sec. 63, Ch. 359, L. 1977; R.C.M. 1947, -2-403.

Part 5

Performance

30-2-501. Insurable interest in goods — manner of identifi- tion of goods. (1) The buyer obtains a special property and an insurable erest in goods by identification of existing goods as goods to which the ntract refers even though the goods so identified are nonconforming and he s an option to return or reject them. Such identification can be made at y time and in any manner explicitly agreed to by the parties. In the sence of explicit agreement identification occurs:

(a) when the contract is made if it is for the sale of goods already existing d identified;

(b) if the contract is for the sale of future goods other than those scribed in paragraph (c), when goods are shipped, marked or otherwise signated by the seller as goods to which the contract refers;

(c) when the crops are planted or otherwise become growing crops or the ng are conceived if the contract is for the sale of unborn young to be born within 12 months after contracting or for the sale of crops to be harveste within 12 months or the next normal harvest season after contracting whichever is longer.

(2) The seller retains an insurable interest in goods so long as title to o any security interest in the goods remains in him and where the identification is by the seller alone he may until default or insolvency or notificatio to the buyer that the identification is final substitute other goods for thos identified.

(3) Nothing in this section impairs any insurable interest recognize under any other statute or rule of law.

History: En. Sec. 2-501, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-501.

30-2-502. Buyer's right to goods on seller's insolvency. (1) Subject to subsection (2) and even though the goods have not been shipped buyer who has paid a part or all of the price of goods in which he has a special property under the provisions of the immediately preceding section ma on making and keeping good a tender of any unpaid portion of their pric recover them from the seller if the seller becomes insolvent within 10 day after receipt of the first installment on their price.

(2) If the identification creating his special property has been made b the buyer he acquires the right to recover the goods only if they conform t the contract for sale.

History: En. Sec. 2-502, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-502.

30-2-503. Manner of seller's tender of delivery. (1) Tender o delivery requires that the seller put and hold conforming goods at the buyer' disposition and give the buyer any notification reasonably necessary t enable him to take delivery. The manner, time and place for tender ar determined by the agreement and this chapter, and in particular:

(a) tender must be at a reasonable hour, and if it is of goods they mus be kept available for the period reasonably necessary to enable the buyer t take possession; but

(b) unless otherwise agreed the buyer must furnish facilities reasonabl suited to the receipt of the goods.

(2) Where the case is within the next section respecting shipment tende requires that the seller comply with its provisions.

(3) Where the seller is required to deliver at a particular destinatio tender requires that he comply with subsection (1) and also in any appropriate case tender documents as described in subsections (4) and (5) of thi section.

(4) Where goods are in the possession of a bailee and are to be delivere without being moved:

(a) tender requires that the seller either tender a negotiable document o title covering such goods or procure acknowledgment by the bailee of th buyer's right to possession of the goods; but

(b) tender to the buyer of a nonnegotiable document of title or of a written direction to the bailee to deliver is sufficient tender unless the buye seasonably objects, and receipt by the bailee of notification of the buyer' rights fixes those rights as against the bailee and all third persons; but ris of loss of the goods and of any failure by the bailee to honor the nonnegotiable document of title or to obey the direction remains on the seller unti e buyer has had a reasonable time to present the document or direction, d a refusal by the bailee to honor the document or to obey the direction feats the tender.

(5) Where the contract requires the seller to deliver documents:

(a) he must tender all such documents in correct form, except as provided this chapter with respect to bills of lading in a set (subsection (2) of -2-323); and

(b) tender through customary banking channels is sufficient and dishonor a draft accompanying the documents constitutes nonacceptance or rejec- on.

History: En. Sec. 2-503, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-503.

30-2-504. Shipment by seller. Where the seller is required or author- ed to send the goods to the buyer and the contract does not require him deliver them at a particular destination, then unless otherwise agreed he ust:

(a) put the goods in the possession of such a carrier and make such a ntract for their transportation as may be reasonable having regard to the ture of the goods and other circumstances of the case; and

(b) obtain and promptly deliver or tender in due form any document cessary to enable the buyer to obtain possession of the goods or otherwise quired by the agreement or by usage of trade; and

(c) promptly notify the buyer of the shipment. Failure to notify the buyer der paragraph (c) or to make a proper contract under paragraph (a) is a ound for rejection only if material delay or loss ensues.

History: En. Sec. 2-504, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-504.

30-2-505. Seller's shipment under reservation. (1) Where the ller has identified goods to the contract by or before shipment:

(a) his procurement of a negotiable bill of lading to his own order or herwise reserves in him a security interest in the goods. His procurement the bill to the order of a financing agency or of the buyer indicates in dition only the seller's expectation of transferring that interest to the rson named.

(b) a nonnegotiable bill of lading to himself or his nominee reserves pos- ssion of the goods as security but except in a case of conditional delivery ıbsection (2) of 30-2-507) a nonnegotiable bill of lading naming the buyer consignee reserves no security interest even though the seller retains pos- ssion of the bill of lading.

(2) When shipment by the seller with reservation of a security interest is violation of the contract for sale it constitutes an improper contract for nsportation within the preceding section but impairs neither the rights en to the buyer by shipment and identification of the goods to the con- ct nor the seller's powers as a holder of a negotiable document.

History: En. Sec. 2-505, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-505.

30-2-506. Rights of financing agency. (1) A financing agency by ying or purchasing for value a draft which relates to a shipment of goods quires to the extent of the payment or purchase and in addition to its own rights under the draft and any document of title securing it any rights of the shipper in the goods including the right to stop delivery and the shipper's right to have the draft honored by the buyer.

(2) The right to reimbursement of a financing agency which has in good faith honored or purchased the draft under commitment to or authority from the buyer is not impaired by subsequent discovery of defects with reference to any relevant document which was apparently regular on its face.

History: **En. Sec. 2-506, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-506.**

30-2-507. Effect of seller's tender — delivery on condition. (1) Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them. Tender entitles the seller to acceptance of the goods and to payment according to the contract.

(2) Where payment is due and demanded on the delivery to the buyer of goods or documents of title, his right as against the seller to retain or dispose of them is conditional upon his making the payment due.

History: **En. Sec. 2-507, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-507.**

30-2-508. Cure by seller of improper tender or delivery — replacement. (1) Where any tender or delivery by the seller is rejected because nonconforming and the time for performance has not yet expired, the seller may seasonably notify the buyer of his intention to cure and may then within the contract time make a conforming delivery.

(2) Where the buyer rejects a nonconforming tender which the seller had reasonable grounds to believe would be acceptable with or without money allowance the seller may if he seasonably notifies the buyer have a further reasonable time to substitute a conforming tender.

History: **En. Sec. 2-508, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-508.**

30-2-509. Risk of loss in the absence of breach. (1) Where the contract requires or authorizes the seller to ship the goods by carrier:

(a) if it does not require him to deliver them at a particular destination, the risk of loss passes to the buyer when the goods are duly delivered to the carrier even though the shipment is under reservation (30-2-505); but

(b) if it does require him to deliver them at a particular destination and the goods are there duly tendered while in the possession of the carrier, the risk of loss passes to the buyer when the goods are there duly so tendered as to enable the buyer to take delivery.

(2) Where the goods are held by a bailee to be delivered without being moved, the risk of loss passes to the buyer:

(a) on his receipt of a negotiable document of title covering the goods; or

(b) on acknowledgment by the bailee of the buyer's right to possession of the goods; or

(c) after his receipt of a nonnegotiable document of title or other written direction to deliver, as provided in subsection (4)(b) of 30-2-503.

(3) In any case not within subsection (1) or (2), the risk of loss passes to the buyer on his receipt of the goods if the seller is a merchant; otherwise the risk passes to the buyer on tender of delivery.

(4) The provisions of this section are subject to contrary agreement of the parties and to the provisions of this chapter on sale on approval (30-2-327) and on effect of breach on risk of loss (30-2-510).

History: **En. Sec. 2-509, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-509.**

30-2-510. Effect of breach on risk of loss. (1) Where a tender or livery of goods so fails to conform to the contract as to give a right of jection the risk of their loss remains on the seller until cure or acceptance.

(2) Where the buyer rightfully revokes acceptance he may to the extent any deficiency in his effective insurance coverage treat the risk of loss as ving rested on the seller from the beginning.

(3) Where the buyer as to conforming goods already identified to the conact for sale repudiates or is otherwise in breach before risk of their loss has ssed to him, the seller may to the extent of any deficiency in his effective surance coverage treat the risk of loss as resting on the buyer for a comercially reasonable time.

History: En. Sec. 2-510, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-510.

30-2-511. Tender of payment by buyer — payment by check. (1) nless otherwise agreed tender of payment is a condition to the seller's duty tender and complete any delivery.

(2) Tender of payment is sufficient when made by any means or in any anner current in the ordinary course of business unless the seller demands yment in legal tender and gives any extension of time reasonably necessary procure it.

(3) Subject to the provisions of this code on the effect of an instrument an obligation (30-3-802), payment by check is conditional and is defeated between the parties by dishonor of the check on due presentment.

History: En. Sec. 2-511, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-511.

30-2-512. Payment by buyer before inspection. (1) Where the ntract requires payment before inspection nonconformity of the goods does t excuse the buyer from so making payment unless:

(a) the nonconformity appears without inspection; or

(b) despite tender of the required documents the circumstances would stify injunction against honor under the provisions of this code (30-5-114).

(2) Payment pursuant to subsection (1) does not constitute an acceptance goods or impair the buyer's right to inspect or any of his remedies.

History: En. Sec. 2-512, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-512.

30-2-513. Buyer's right to inspection of goods. (1) Unless otherse agreed and subject to subsection (3), where goods are tendered or delived or identified to the contract for sale, the buyer has a right before yment or acceptance to inspect them at any reasonable place and time and any reasonable manner. When the seller is required or authorized to send e goods to the buyer, the inspection may be after their arrival.

(2) Expenses of inspection must be borne by the buyer but may be covered from the seller if the goods do not conform and are rejected.

(3) Unless otherwise agreed and subject to the provisions of this chapter C.I.F. contracts (subsection (3) of 30-2-321), the buyer is not entitled to spect the goods before payment of the price when the contract provides:

(a) for delivery "C.O.D." or on other like terms; or

(b) for payment against documents of title, except where such payment due only after the goods are to become available for inspection.

(4) A place or method of inspection fixed by the parties is presumed to be exclusive but unless otherwise expressly agreed it does not postpone identification or shift the place for delivery or for passing the risk of loss. If compliance becomes impossible, inspection shall be as provided in this section unless the place or method fixed was clearly intended as an indispensable condition failure of which avoids the contract.

History: **En. Sec. 2-513, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-513.**

30-2-514. When documents deliverable on acceptance — when on payment. Unless otherwise agreed documents against which a draft is drawn are to be delivered to the drawee on acceptance of the draft if it is payable more than 3 days after presentment; otherwise, only on payment.

History: **En. Sec. 2-514, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-514.**

30-2-515. Preserving evidence of goods in dispute. In furtherance of the adjustment of any claim or dispute:

(a) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other; and

(b) the parties may agree to a third party inspection or survey to determine the conformity or condition of the goods and may agree that the findings shall be binding upon them in any subsequent litigation or adjustment.

History: **En. Sec. 2-515, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-515.**

Part 6

Breach, Repudiation, and Excuse

30-2-601. Buyer's rights on improper delivery. Subject to the provisions of this chapter on breach in installment contracts (30-2-612) and unless otherwise agreed under the sections on contractual limitations of remedy (30-2-718 and 30-2-719), if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may:

(a) reject the whole; or

(b) accept the whole; or

(c) accept any commercial unit or units and reject the rest.

History: **En. Sec. 2-601, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-601.**

30-2-602. Manner and effect of rightful rejection. (1) Rejection of goods must be within a reasonable time after their delivery or tender. It is ineffective unless the buyer seasonably notifies the seller.

(2) Subject to the provisions of the two following sections on rejected goods (30-2-603 and 30-2-604):

(a) after rejection any exercise of ownership by the buyer with respect to any commercial unit is wrongful as against the seller; and

(b) if the buyer has before rejection taken physical possession of goods in which he does not have a security interest under the provisions of this chapter (subsection (3) of 30-2-711), he is under a duty after rejection to hold them with reasonable care at the seller's disposition for a time sufficient to permit the seller to remove them; but

(c) the buyer has no further obligations with regard to goods rightfully rejected.

(3) The seller's rights with respect to goods wrongfully rejected are governed by the provisions of this chapter on seller's remedies in general (30-2-703).

History: **En. Sec. 2-602, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-602.**

30-2-603. Merchant buyer's duties as to rightfully rejected goods. (1) Subject to any security interest in the buyer (subsection (3) of 30-2-711), when the seller has no agent or place of business at the market of rejection a merchant buyer is under a duty after rejection of goods in his possession or control to follow any reasonable instructions received from the seller with respect to the goods and in the absence of such instructions to make reasonable efforts to sell them for the seller's account if they are perishable or threaten to decline in value speedily. Instructions are not reasonable if on demand indemnity for expenses is not forthcoming.

(2) When the buyer sells goods under subsection (1), he is entitled to reimbursement from the seller or out of the proceeds for reasonable expenses of caring for and selling them, and if the expenses include no selling commission then to such commission as is usual in the trade or if there is none to a reasonable sum not exceeding 10% on the gross proceeds.

(3) In complying with this section the buyer is held only to good faith and good faith conduct hereunder is neither acceptance nor conversion nor the basis of an action for damages.

History: **En. Sec. 2-603, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-603.**

30-2-604. Buyer's options as to salvage of rightfully rejected goods. Subject to the provisions of the immediately preceding section on perishables if the seller gives no instruction within a reasonable time after notification of rejection the buyer may store the rejected goods for the seller's account or reship them to him or resell them for the seller's account with reimbursement as provided in the preceding section. Such action is not acceptance or conversion.

History: **En. Sec. 2-604, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-604.**

30-2-605. Waiver of buyer's objections by failure to particularize. (1) The buyer's failure to state in connection with rejection a particular defect which is ascertainable by reasonable inspection precludes him from relying on the unstated defect to justify rejection or to establish breach:

(a) where the seller could have cured it if stated seasonably; or

(b) between merchants when the seller has after rejection made a request in writing for a full and final written statement of all defects on which the buyer proposes to rely.

(2) Payment against documents made without reservation of rights precludes recovery of the payment for defects apparent on the face of the documents.

History: **En. Sec. 2-605, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-605.**

30-2-606. What constitutes acceptance of goods. (1) Acceptance of goods occurs when the buyer:

(a) after a reasonable opportunity to inspect the goods signifies to the seller that the goods are conforming or that he will take or retain them in spite of their nonconformity; or

(b) fails to make an effective rejection (subsection (1) of 30-2-602), but such acceptance does not occur until the buyer has had a reasonable opportunity to inspect them; or

(c) does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

(2) Acceptance of a part of any commercial unit is acceptance of that entire unit.

History: **En. Sec. 2-606, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-606.**

30-2-607. Effect of acceptance — notice of breach — burden of establishing breach after acceptance — notice of claim or litigation to person answerable over. (1) The buyer must pay at the contract rate for any goods accepted.

(2) Acceptance of goods by the buyer precludes rejection of the goods accepted and if made with knowledge of a nonconformity cannot be revoked because of it unless the acceptance was on the reasonable assumption that the nonconformity would be seasonably cured but acceptance does not of itself impair any other remedy provided by this chapter for nonconformity.

(3) Where a tender has been accepted:

(a) the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy; and

(b) if the claim is one for infringement or the like (subsection (3) of 30-2-312) and the buyer is sued as a result of such a breach he must so notify the seller within a reasonable time after he receives notice of the litigation or be barred from any remedy over for liability established by the litigation.

(4) The burden is on the buyer to establish any breach with respect to the goods accepted.

(5) Where the buyer is sued for breach of a warranty or other obligation for which his seller is answerable over:

(a) he may give his seller written notice of the litigation. If the notice states that the seller may come in and defend and that if the seller does not do so he will be bound in any action against him by his buyer by any determination of fact common to the two litigations, then unless the seller after seasonable receipt of the notice does come in and defend he is so bound.

(b) if the claim is one for infringement or the like (subsection (3) of 30-2-312) the original seller may demand in writing that his buyer turn over to him control of the litigation including settlement or else be barred from any remedy over and if he also agrees to bear all expense and to satisfy any adverse judgment, then unless the buyer after seasonable receipt of the demand does turn over control the buyer is so barred.

(6) The provisions of subsections (3), (4) and (5) apply to any obligation of a buyer to hold the seller harmless against infringement or the like (subsection (3) of 30-2-312).

History: **En. Sec. 2-607, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-607.**

30-2-608. Revocation of acceptance in whole or in part. (1) The uyer may revoke his acceptance of a lot or commercial unit whose nononformity substantially impairs its value to him if he has accepted it:

(a) on the reasonable assumption that its nonconformity would be cured nd it has not been seasonably cured; or

(b) without discovery of such nonconformity if his acceptance was reasonbly induced either by the difficulty of discovery before acceptance or by the ller's assurances.

(2) Revocation of acceptance must occur within a reasonable time after he buyer discovers or should have discovered the ground for it and before ny substantial change in condition of the goods which is not caused by their wn defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard o the goods involved as if he had rejected them.

History: En. Sec. 2-608, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-608.

30-2-609. Right to adequate assurance of performance. (1) A ontract for sale imposes an obligation on each party that the other's expecation of receiving due performance will not be impaired. When reasonable rounds for insecurity arise with respect to the performance of either party he other may in writing demand adequate assurance of due performance and ntil he receives such assurance may if commercially reasonable suspend any erformance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and he adequacy of any assurance offered shall be determined according to comercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice he aggrieved party's right to demand adequate assurance of future perforance.

(4) After receipt of a justified demand failure to provide within a reasonble time not exceeding 30 days such assurance of due performance as is adeuate under the circumstances of the particular case is a repudiation of the ontract.

History: En. Sec. 2-609, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-609.

30-2-610. Anticipatory repudiation. When either party repudiates e contract with respect to a performance not yet due the loss of which will ubstantially impair the value of the contract to the other, the aggrieved arty may:

(a) for a commercially reasonable time await performance by the repuating party; or

(b) resort to any remedy for breach (30-2-703 or 30-2-711), even though e has notified the repudiating party that he would await the latter's perforance and has urged retraction; and

(c) in either case suspend his own performance or proceed in accordance ith the provisions of this chapter on the seller's right to identify goods to he contract notwithstanding breach or to salvage unfinished goods 0-2-704).

History: En. Sec. 2-610, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-610.

30-2-611. Retraction of anticipatory repudiation. (1) Until the repudiating party's next performance is due he can retract his repudiation unless the aggrieved party has since the repudiation canceled or materially changed his position or otherwise indicated that he considers the repudiation final.

(2) Retraction may be by any method which clearly indicates to the aggrieved party that the repudiating party intends to perform, but must include any assurance justifiably demanded under the provisions of this chapter (30-2-609).

(3) Retraction reinstates the repudiating party's rights under the contract with due excuse and allowance to the aggrieved party for any delay occasioned by the repudiation.

History: **En. Sec. 2-611, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-611.**

30-2-612. "Installment contract" — breach. (1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer may reject any installment which is nonconforming if the nonconformity substantially impairs the value of that installment and cannot be cured or if the nonconformity is a defect in the required documents; but if the nonconformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever nonconformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a nonconforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

History: **En. Sec. 2-612, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-612.**

30-2-613. Casualty to identified goods. Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a "no arrival, no sale" term (30-2-324) then:

(a) if the loss is total the contract is avoided; and

(b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller.

History: **En. Sec. 2-613, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-613.**

30-2-614. Substituted performance. (1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable bstitute is available, such substitute performance must be tendered and cepted.

(2) If the agreed means or manner of payments fails because of domestic foreign governmental regulation, the seller may withhold or stop delivery less the buyer provides a means or manner of payment which is commer- ally a substantial equivalent. If delivery has already been taken, payment the means or in the manner provided by the regulation discharges the yer's obligation unless the regulation is discriminatory, oppressive or edatory.

History: En. Sec. 2-614, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-614.

30-2-615. Excuse by failure of presupposed conditions. Except far as a seller may have assumed a greater obligation and subject to the eceding section on substituted performance:

(a) Delay in delivery or nondelivery in whole or in part by a seller who mplies with paragraphs (b) and (c) is not a breach of his duty under a con- act for sale if performance as agreed has been made impracticable by the currence of a contingency the nonoccurrence of which was a basic assump- on on which the contract was made or by compliance in good faith with any plicable foreign or domestic governmental regulation or order whether or t it later proves to be invalid.

(b) Where the causes mentioned in paragraph (a) affect only a part of the ller's capacity to perform, he must allocate production and deliveries nong his customers but may at his option include regular customers not en under contract as well as his own requirements for further manufacture. e may so allocate in any manner which is fair and reasonable.

(c) The seller must notify the buyer seasonably that there will be delay nondelivery and, when allocation is required under paragraph (b), of the timated quota thus made available for the buyer.

History: En. Sec. 2-615, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-615.

30-2-616. Procedure on notice claiming excuse. (1) Where the yer receives notification of a material or indefinite delay or an allocation stified under the preceding section he may by written notification to the ller as to any delivery concerned, and where the prospective deficiency sub- antially impairs the value of the whole contract under the provisions of this apter relating to breach of installment contracts (30-2-612), then also as to e whole:

(a) terminate and thereby discharge any unexecuted portion of the con- act; or

(b) modify the contract by agreeing to take his available quota in sub- tution.

(2) If after receipt of such notification from the seller the buyer fails so modify the contract within a reasonable time not exceeding 30 days the ntract lapses with respect to any deliveries affected.

(3) The provisions of this section may not be negated by agreement cept insofar as the seller has assumed a greater obligation under the pre- ding section.

History: En. Sec. 2-616, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-616.

Part 7

Remedies

30-2-701. Remedies for breach of collateral contracts not impaired. Remedies for breach of any obligation or promise collateral or ancillary to a contract for sale are not impaired by the provisions of this chapter.

History: En. Sec. 2-701, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-701.

30-2-702. Seller's remedies on discovery of buyer's insolvency. (1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including payment for all goods theretofore delivered under the contract, and stop delivery under this chapter (30-2-705).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within 10 days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within 3 months before delivery the 10-day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser or lien creditor under this chapter (30-2-403). Successful reclamation of goods excludes all other remedies with respect to them.

History: En. Sec. 2-702, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-702.

30-2-703. Seller's remedies in general. Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract (30-2-612), then also with respect to the whole undelivered balance, the aggrieved seller may:

(a) withhold delivery of such goods;

(b) stop delivery by any bailee as hereafter provided (30-2-705);

(c) proceed under the next section respecting goods still unidentified to the contract;

(d) resell and recover damages as hereafter provided (30-2-706);

(e) recover damages for nonacceptance (30-2-708) or in a proper case the price (30-2-709);

(f) cancel.

History: En. Sec. 2-703, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-703.

30-2-704. Seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods. (1) An aggrieved seller under the preceding section may:

(a) identify to the contract conforming goods not already identified if at the time he learned of the breach they are in his possession or control;

(b) treat as the subject of resale goods which have demonstrably been intended for the particular contract even though those goods are unfinished.

(2) Where the goods are unfinished an aggrieved seller may in the exer- se of reasonable commercial judgment for the purposes of avoiding loss and effective realization either complete the manufacture and wholly identify e goods to the contract or cease manufacture and resell for scrap or salvage lue or proceed in any other reasonable manner.

History: En. Sec. 2-704, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-704.

30-2-705. Seller's stoppage of delivery in transit or otherwise.) The seller may stop delivery of goods in the possession of a carrier or her bailee when he discovers the buyer to be insolvent (30-2-702) and may op delivery of carload, truckload, planeload or larger shipments of express freight when the buyer repudiates or fails to make a payment due before livery or if for any other reason the seller has a right to withhold or claim the goods.

(2) As against such buyer the seller may stop delivery until:

(a) receipt of the goods by the buyer; or

(b) acknowledgment to the buyer by any bailee of the goods except a car- er that the bailee holds the goods for the buyer; or

(c) such acknowledgment to the buyer by a carrier by reshipment or as arehouseman; or

(d) negotiation to the buyer of any negotiable document of title covering e goods.

(3) (a) To stop delivery the seller must so notify as to enable the bailee ' reasonable diligence to prevent delivery of the goods.

(b) After such notification the bailee must hold and deliver the goods cording to the directions of the seller but the seller is liable to the bailee r any ensuing charges or damages.

(c) If a negotiable document of title has been issued for goods the bailee not obliged to obey a notification to stop until surrender of the document.

(d) A carrier who has issued a nonnegotiable bill of lading is not obliged obey a notification to stop received from a person other than the con- gnor.

History: En. Sec. 2-705, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-705.

30-2-706. Seller's resale including contract for resale. (1) Under e conditions stated in 30-2-703 on seller's remedies, the seller may resell e goods concerned or the undelivered balance thereof. Where the resale is ade in good faith and in a commercially reasonable manner the seller may cover the difference between the resale price and the contract price gether with any incidental damages allowed under the provisions of this apter (30-2-710), but less expenses saved in consequence of the buyer's each.

(2) Except as otherwise provided in subsection (3) or unless otherwise reed resale may be at public or private sale including sale by way of one more contracts to sell or of identification to an existing contract of the ler. Sale may be as a unit or in parcels and at any time and place and any terms but every aspect of the sale including the method, manner, ne, place and terms must be commercially reasonable. The resale must be

reasonably identified as referring to the broken contract, but it is not necessary that the goods be in existence or that any or all of them have been identified to the contract before the breach.

(3) Where the resale is at private sale the seller must give the buyer reasonable notification of his intention to resell.

(4) Where the resale is at public sale:

(a) only identified goods can be sold except where there is a recognized market for a public sale of futures in goods of the kind; and

(b) it must be made at a usual place or market for public sale if one is reasonably available and except in the case of goods which are perishable or threaten to decline in value speedily the seller must give the buyer reasonable notice of the time and place of the resale; and

(c) if the goods are not to be within the view of those attending the sale the notification of sale must state the place where the goods are located and provide for their reasonable inspection by prospective bidders; and

(d) the seller may buy.

(5) A purchaser who buys in good faith at a resale takes the goods free of any rights of the original buyer even though the seller fails to comply with one or more of the requirements of this section.

(6) The seller is not accountable to the buyer for any profit made on any resale. A person in the position of a seller (30-2-707) or a buyer who has rightfully rejected or justifiably revoked acceptance must account for any excess over the amount of his security interest, as hereinafter defined (subsection (3) of 30-2-711).

History: **En. Sec. 2-706, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-706.**

30-2-707. "Person in the position of a seller". (1) A "person in the position of a seller" includes as against a principal an agent who has paid or become responsible for the price of goods on behalf of his principal or anyone who otherwise holds a security interest or other right in goods similar to that of a seller.

(2) A person in the position of a seller may as provided in this chapter withhold or stop delivery (30-2-705) and resell (30-2-706) and recover incidental damages (30-2-710).

History: **En. Sec. 2-707, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-707.**

30-2-708. Seller's damages for nonacceptance or repudiation. (1) Subject to subsection (2) and to the provisions of this chapter with respect to proof of market price (30-2-723), the measure of damages for nonacceptance or repudiation by the buyer is the difference between the market price at the time and place for tender and the unpaid contract price together with any incidental damages provided in this chapter (30-2-710), but less expenses saved in consequence of the buyer's breach.

(2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this chapter (30-2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

History: **En. Sec. 2-708, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-708.**

30-2-709. Action for the price. (1) When the buyer fails to pay the ice as it becomes due the seller may recover, together with any incidental mages under the next section, the price:

(a) of goods accepted or of conforming goods lost or damaged within a mmercially reasonable time after risk of their loss has passed to the buyer; d

(b) of goods identified to the contract if the seller is unable after reason- le effort to resell them at a reasonable price or the circumstances reason- ly indicate that such effort will be unavailing.

(2) Where the seller sues for the price he must hold for the buyer any ods which have been identified to the contract and are still in his control cept that if resale becomes possible he may resell them at any time prior the collection of the judgment. The net proceeds of any such resale must credited to the buyer and payment of the judgment entitles him to any ods not resold.

(3) After the buyer has wrongfully rejected or revoked acceptance of the ods or has failed to make a payment due or has repudiated (30-2-610), a ler who is held not entitled to the price under this section shall neverthe- s be awarded damages for nonacceptance under the preceding section.

istory: En. Sec. 2-709, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-709.

30-2-710. Seller's incidental damages. Incidental damages to an grieved seller include any commercially reasonable charges, expenses or mmissions incurred in stopping delivery, in the transportation, care and stody of goods after the buyer's breach, in connection with return or resale the goods or otherwise resulting from the breach.

istory: En. Sec. 2-710, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-710.

30-2-711. Buyer's remedies in general — buyer's security terest in rejected goods. (1) Where the seller fails to make delivery or pudiates or the buyer rightfully rejects or justifiably revokes acceptance en with respect to any goods involved, and with respect to the whole if the each goes to the whole contract (30-2-612), the buyer may cancel and ether or not he has done so may in addition to recovering so much of the ice as has been paid:

(a) "cover" and have damages under the next section as to all the goods ected whether or not they have been identified to the contract; or

(b) recover damages for nondelivery as provided in this chapter -2-713).

(2) Where the seller fails to deliver or repudiates the buyer may also:

(a) if the goods have been identified recover them as provided in this apter (30-2-502); or

(b) in a proper case obtain specific performance or recover the goods as ovided in this chapter (30-2-716).

3) On rightful rejection or justifiable revocation of acceptance a buyer s a security interest in goods in his possession or control for any payments de on their price and any expenses reasonably incurred in their inspection, eipt, transportation, care and custody and may hold such goods and resell em in like manner as an aggrieved seller (30-2-706).

istory: En. Sec. 2-711, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-711.

30-2-712. "Cover" — buyer's procurement of substitute good (1) After a breach within the preceding section the buyer may "cover" l making in good faith and without unreasonable delay any reasonable pu chase of or contract to purchase goods in substitution for those due from tl seller.

(2) The buyer may recover from the seller as damages the differen between the cost of cover and the contract price together with any incident or consequential damages as hereinafter defined (30-2-715), but less expens saved in consequence of the seller's breach.

(3) Failure of the buyer to effect cover within this section does not b him from any other remedy.

History: **En. Sec. 2-712, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-712.**

30-2-713. Buyer's damages for nondelivery or repudiation. (Subject to the provisions of this chapter with respect to proof of mark price (30-2-723), the measure of damages for nondelivery or repudiation b the seller is the difference between the market price at the time when th buyer learned of the breach and the contract price together with any inc dental and consequential damages provided in this chapter (30-2-715), bu less expenses saved in consequence of the seller's breach.

(2) Market price is to be determined as of the place for tender or, i cases of rejection after arrival or revocation of acceptance, as of the place (arrival.

History: **En. Sec. 2-713, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-713.**

30-2-714. Buyer's damages for breach in regard to accepte goods. (1) Where the buyer has accepted goods and given notification (subsection (3) of 30-2-607) he may recover as damages for any nonconformity (tender the loss resulting in the ordinary course of events from the seller breach as determined in any manner which is reasonable.

(2) The measure of damages for breach of warranty is the difference a the time and place of acceptance between the value of the goods accepte and the value they would have had if they had been as warranted, unles special circumstances show proximate damages of a different amount.

(3) In a proper case any incidental and consequential damages under th next section may also be recovered.

History: **En. Sec. 2-714, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-714.**

30-2-715. Buyer's incidental and consequential damages. (1 Incidental damages resulting from the seller's breach include expense reasonably incurred in inspection, receipt, transportation and care and custody of goods rightfully rejected, any commercially reasonable charges expenses or commissions in connection with effecting cover and any othe reasonable expense incident to the delay or other breach.

(2) Consequential damages resulting from the seller's breach include:

(a) any loss resulting from general or particular requirements and need of which the seller at the time of contracting had reason to know and whic could not reasonably be prevented by cover or otherwise; and

(b) injury to person or property proximately resulting from any breach c warranty.

History: **En. Sec. 2-715, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-715.**

30-2-716. Buyer's right to specific performance or recovery of oods. (1) Specific performance may be decreed where the goods are unique r in other proper circumstances.

(2) The decree for specific performance may include such terms and conitions as to payment of the price, damages, or other relief as the court may eem just.

(3) The buyer has a right to maintain an action for the recovery of goods dentified to the contract if after reasonable effort he is unable to effect over for such goods or the circumstances reasonably indicate that such effort ill be unavailing or if the goods have been shipped under reservation and atisfaction of the security interest in them has been made or tendered.

History: **En. Sec. 2-716, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-716.**

30-2-717. Deduction of damages from the price. The buyer on otifying the seller of his intention to do so may deduct all or any part of he damages resulting from any breach of contract from any part of the price ill due under the same contract.

History: **En. Sec. 2-717, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-717.**

30-2-718. Liquidation or limitation of damages — deposits. (1) amages for breach by either party may be liquidated in the agreement but nly at an amount which is reasonable in the light of the anticipated or actu- harm caused by the breach, the difficulties of proof of loss, and the inconenience or nonfeasibility of otherwise obtaining an adequate remedy. A term xing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the uyer's breach, the buyer is entitled to restitution of any amount by which he sum of his payments exceeds:

(a) the amount to which the seller is entitled by virtue of terms liquiating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, 20% of the value of the total perforance for which the buyer is obligated under the contract or $500, whichever smaller.

(3) The buyer's right to restitution under subsection (2) is subject to fset to the extent that the seller establishes:

(a) a right to recover damages under the provisions of this chapter other an subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or directly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value the proceeds of their resale shall be treated as payments for the purposes subsection (2); but if the seller has notice of the buyer's breach before selling goods received in part performance, his resale is subject to the contions laid down in this chapter on resale by an aggrieved seller (30-2-706).

History: **En. Sec. 2-718, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-718.**

30-2-719. Contractual modification or limitation of remedy. (1) ubject to the provisions of subsections (2) and (3) of this section and of the eceding section on liquidation and limitation of damages,

(a) the agreement may provide for remedies in addition to or in substitution for those provided in this chapter and may limit or alter the measur of damages recoverable under this chapter, as by limiting the buyer's remedies to return of the goods and repayment of the price or to repair an replacement of nonconforming goods or parts; and

(b) resort to a remedy as provided is optional unless the remedy i expressly agreed to be exclusive, in which case it is the sole remedy.

(2) Where circumstances cause an exclusive or limited remedy to fail c its essential purpose, remedy may be had as provided in this code.

(3) Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages fo injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not.

History: **En. Sec. 2-719, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-719.**

30-2-720. Effect of "cancellation" or "rescission" on claims fo antecedent breach. Unless the contrary intention clearly appears, expressions of "cancellation" or "rescission" of the contract or the like shall not b construed as a renunciation or discharge of any claim in damages for an antecedent breach.

History: **En. Sec. 2-720, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-720.**

30-2-721. Remedies for fraud. Remedies for material misrepresentation or fraud include all remedies available under this chapter fo nonfraudulent breach. Neither rescission or a claim for rescission of the contract for sale nor rejection or return of the goods shall bar or be deeme inconsistent with a claim for damages or other remedy.

History: **En. Sec. 2-721, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-721.**

30-2-722. Who can sue third parties for injury to goods. Wher a third party so deals with goods which have been identified to a contrac for sale as to cause actionable injury to a party to that contract:

(a) a right of action against the third party is in either party to the contract for sale who has title to or a security interest or a special property o an insurable interest in the goods; and if the goods have been destroyed o converted a right of action is also in the party who either bore the risk o loss under the contract for sale or has since the injury assumed that risk a against the other;

(b) if at the time of the injury the party plaintiff did not bear the risk of loss as against the other party to the contract for sale and there is n arrangement between them for disposition of the recovery, his suit or settlement is, subject to his own interest, as a fiduciary for the other party to th contract;

(c) either party may with the consent of the other sue for the benefit o whom it may concern.

History: **En. Sec. 2-722, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-722.**

30-2-723. Proof of market price — time and place. (1) If a action based on anticipatory repudiation comes to trial before the time fo performance with respect to some or all of the goods, any damages based o market price (30-2-708 or 30-2-713) shall be determined according to th price of such goods prevailing at the time when the aggrieved party learne of the repudiation.

(2) If evidence of a price prevailing at the times or places described in is chapter is not readily available the price prevailing within any reason- le time before or after the time described or at any other place which in mmercial judgment or under usage of trade would serve as a reasonable bstitute for the one described may be used, making any proper allowance r the cost of transporting the goods to or from such other place.

(3) Evidence of a relevant price prevailing at a time or place other than e one described in this chapter offered by one party is not admissible less and until he has given the other party such notice as the court finds fficient to prevent unfair surprise.

History: En. Sec. 2-723, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-723.

30-2-724. Admissibility of market quotations. Whenever the pre- iling price or value of any goods regularly bought and sold in any estab- hed commodity market is in issue, reports in official publications or trade ırnals or in newspapers or periodicals of general circulation published as e reports of such market shall be admissible in evidence. The circum- ances of the preparation of such a report may be shown to affect its weight t not its admissibility.

History: En. Sec. 2-724, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-724.

30-2-725. Statute of limitations in contracts for sale. (1) An tion for breach of any contract for sale must be commenced within 4 years ter the cause of action has accrued. By the original agreement the parties ay reduce the period of limitation to not less than 1 year but may not tend it.

(2) A cause of action accrues when the breach occurs, regardless of the grieved party's lack of knowledge of the breach. A breach of warranty curs when tender of delivery is made, except that where a warranty explic- y extends to future performance of the goods and discovery of the breach ıst await the time of such performance the cause of action accrues when e breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) so terminated as to leave available a remedy by another action for the me breach such other action may be commenced after the expiration of the ne limited and within 6 months after the termination of the first action less the termination resulted from voluntary discontinuance or from dis- ssal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limita- ns nor does it apply to causes of action which have accrued before this de becomes effective.

History: En. Sec. 2-725, Ch. 264, L. 1963; R.C.M. 1947, 87A-2-725.

CHAPTER 3

UNIFORM COMMERCIAL CODE
COMMERCIAL PAPER

Part 1 — Short Title, Form, and Interpretation

tion

3-101. Short title.
3-102. Definitions and index of definitions.

30-3-103. Limitations on scope of chapter.
30-3-104. Form of negotiable instruments — "draft" — "check" — "certificate of deposit" "note".
30-3-105. When promise or order unconditional.
30-3-106. Sum certain.
30-3-107. Money.
30-3-108. Payable on demand.
30-3-109. Definite time.
30-3-110. Payable to order.
30-3-111. Payable to bearer.
30-3-112. Terms and omissions not affecting negotiability.
30-3-113. Seal.
30-3-114. Date, antedating, postdating.
30-3-115. Incomplete instruments.
30-3-116. Instruments payable to two or more persons.
30-3-117. Instruments payable with words of description.
30-3-118. Ambiguous terms and rules of construction.
30-3-119. Other writings affecting instrument.
30-3-120. Instruments "payable through" bank.
30-3-121. Instruments payable at bank.
30-3-122. Accrual of cause of action.
30-3-123. Holder's power to sue on overdue negotiable instruments — transfer.

Part 2 — Transfer and Negotiation

30-3-201. Transfer — right to endorsement.
30-3-202. Negotiation.
30-3-203. Wrong or misspelled name.
30-3-204. Special endorsement — blank endorsement.
30-3-205. Restrictive endorsements.
30-3-206. Effect of restrictive endorsement.
30-3-207. Negotiation effective although it may be rescinded.
30-3-208. Reacquisition.

Part 3 — Rights of a Holder

30-3-301. Rights of a holder.
30-3-302. Holder in due course.
30-3-303. Taking for value.
30-3-304. Notice to purchaser.
30-3-305. Rights of a holder in due course.
30-3-306. Rights of one not holder in due course.
30-3-307. Burden of establishing signatures, defenses, and due course.

Part 4 — Liability of Parties

30-3-401. Signature.
30-3-402. Signature in ambiguous capacity.
30-3-403. Signature by authorized representative.
30-3-404. Unauthorized signatures.
30-3-405. Impostors — signature in name of payee.
30-3-406. Negligence contributing to alteration or unauthorized signature.
30-3-407. Alteration.
30-3-408. Consideration.
30-3-409. Draft not an assignment.
30-3-410. Definition and operation of acceptance.
30-3-411. Certification of a check.
30-3-412. Acceptance varying draft.
30-3-413. Contract of maker, drawer and acceptor.
30-3-414. Contract of endorser — order of liability.
30-3-415. Contract of accommodation party.
30-3-416. Contract of guarantor.
30-3-417. Warranties on presentment and transfer.

-3-418. Finality of payment or acceptance.
-3-419. Conversion of instrument — innocent representative.

Part 5 — Presentment, Notice of Dishonor, and Protest

-3-501. When presentment, notice of dishonor, and protest necessary or permissible.
-3-502. Unexcused delay — discharge.
-3-503. Time of presentment.
-3-504. How presentment made.
-3-505. Rights of party to whom presentment is made.
-3-506. Time allowed for acceptance or payment.
-3-507. Dishonor — holder's right of recourse — term allowing re-presentment.
-3-508. Notice of dishonor.
-3-509. Protest — noting for protest.
-3-510. Evidence of dishonor and notice of dishonor.
-3-511. Waived or excused presentment, protest or notice of dishonor or delay therein.

Part 6 — Discharge

-3-601. Discharge of parties.
-3-602. Effect of discharge against holder in due course.
-3-603. Payment or satisfaction.
-3-604. Tender of payment.
-3-605. Cancellation and renunciation.
-3-606. Impairment of recourse or of collateral.

Part 7 — Advice of International Sight Draft

-3-701. Letter of advice of international sight draft.

Part 8 — Miscellaneous

-3-801. Drafts in a set.
-3-802. Effect of instrument on obligation for which it is given.
-3-803. Notice to third party.
-3-804. Lost, destroyed or stolen instruments.
-3-805. Instruments not payable to order or to bearer.

Part 1

Short Title, Form, and Interpretation

30-3-101. Short title. This chapter shall be known and may be cited Uniform Commercial Code—Commercial Paper.

History: En. Sec. 3-101, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-101.

30-3-102. Definitions and index of definitions. (1) In this chapter nless the context otherwise requires:

(a) "Issue" means the first delivery of an instrument to a holder or a mitter.

(b) An "order" is a direction to pay and must be more than an authoriza-on or request. It must identify the person to pay with reasonable certainty. may be addressed to one or more such persons jointly or in the alternative ut not in succession.

(c) A "promise" is an undertaking to pay and must be more than a acknowledgment of an obligation.

(d) "Secondary party" means a drawer or endorser.

(e) "Instrument" means a negotiable instrument.

(2) Other definitions applying to this chapter and the sections in whic they appear are:

"Acceptance". 30-3-410.
"Accommodation party". 30-3-415.
"Alteration". 30-3-407.
"Certificate of deposit". 30-3-104.
"Certification". 30-3-411.
"Check". 30-3-104.
"Definite time". 30-3-109.
"Dishonor". 30-3-507.
"Draft". 30-3-104.
"Holder in due course". 30-3-302.
"Negotiation". 30-3-202.
"Note". 30-3-104.
"Notice of dishonor". 30-3-508.
"On demand". 30-3-108.
"Presentment". 30-3-504.
"Protest". 30-3-509.
"Restrictive endorsement". 30-3-205.
"Signature". 30-3-401.

(3) The following definitions in other chapters apply to this chapter:

"Account". 30-4-104.
"Banking day". 30-4-104.
"Clearinghouse". 30-4-104.
"Collecting bank". 30-4-105.
"Customer". 30-4-104.
"Depositary bank". 30-4-105.
"Documentary draft". 30-4-104.
"Intermediary bank". 30-4-105.
"Item". 30-4-104.
"Midnight deadline". 30-4-104.
"Payor bank". 30-4-105.

(4) In addition Chapter 1 contains general definitions and principles o construction and interpretation applicable throughout this chapter.

History: En. Sec. 3-102, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-102.

30-3-103. Limitations on scope of chapter. (1) This chapter doe not apply to money, documents of title or investment securities.

(2) The provisions of this chapter are subject to the provisions of th Chapter on Bank Deposits and Collections (Chapter 4) and Secured Transactions (Chapter 9).

History: En. Sec. 3-103, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-103.

30-3-104. Form of negotiable instruments — "draft" — "check" — "certificate of deposit" — "note". (1) Any writing to be a negotiabl instrument within this chapter must:

(a) be signed by the maker or drawer; and

(b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this chapter; and

(c) be payable on demand or at a definite time; and

(d) be payable to order or to bearer.

(2) A writing which complies with the requirements of this section is:

(a) a "draft" ("bill of exchange") if it is an order;

(b) a "check" if it is a draft drawn on a bank and payable on demand;

(c) a "certificate of deposit" if it is an acknowledgment by a bank of eceipt of money with an engagement to repay it;

(d) a "note" if it is a promise other than a certificate of deposit.

(3) As used in other chapters of this code, and as the context may equire, the terms "draft", "check", "certificate of deposit" and "note" may efer to instruments which are not negotiable within this chapter as well as o instruments which are so negotiable.

History: En. Sec. 3-104, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-104.

30-3-105. When promise or order unconditional. (1) A promise or rder otherwise unconditional is not made conditional by the fact that the nstrument:

(a) is subject to implied or constructive conditions; or

(b) states its consideration, whether performed or promised, or the transction which gave rise to the instrument, or that the promise or order is made or the instrument matures in accordance with or "as per" such transction; or

(c) refers to or states that it arises out of a separate agreement or refers o a separate agreement for rights as to prepayment or acceleration; or

(d) states that it is drawn under a letter of credit; or

(e) states that it is secured, whether by mortgage, reservation of title or therwise; or

(f) indicates a particular account to be debited or any other fund or ource from which reimbursement is expected; or

(g) is limited to payment out of a particular fund or the proceeds of a articular source, if the instrument is issued by a government or governmenal agency or unit; or

(h) is limited to payment out of the entire assets of a partnership, unincorporated association, trust or estate by or on behalf of which the instrument is issued.

(2) A promise or order is not unconditional if the instrument:

(a) states that it is subject to or governed by any other agreement; or

(b) states that it is to be paid only out of a particular fund or source xcept as provided in this section.

History: En. Sec. 3-105, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-105.

30-3-106. Sum certain. (1) The sum payable is a sum certain even hough it is to be paid:

(a) with stated interest or by stated installments; or

(b) with stated different rates of interest before and after default or a pecified date; or

(c) with a stated discount or addition if paid before or after the date fixed for payment; or

(d) with exchange or less exchange, whether at a fixed rate or at the current rate; or

(e) with costs of collection or an attorney's fee or both upon default.

(2) Nothing in this section shall validate any term which is otherwise illegal.

History: **En. Sec. 3-106, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-106.**

30-3-107. Money. (1) An instrument is payable in money if the medium of exchange in which it is payable is money at the time the instrument is made. An instrument payable in "currency" or "current funds" is payable in money.

(2) A promise or order to pay a sum stated in a foreign currency is for a sum certain in money and, unless a different medium of payment is specified in the instrument, may be satisfied by payment of that number of dollars which the stated foreign currency will purchase at the buying sight rate for that currency on the day on which the instrument is payable or, if payable on demand, on the day of demand. If such an instrument specifies a foreign currency as the medium of payment the instrument is payable in that currency.

History: **En. Sec. 3-107, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-107.**

30-3-108. Payable on demand. Instruments payable on demand include those payable at sight or on presentation and those in which no time for payment is stated.

History: **En. Sec. 3-108, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-108.**

30-3-109. Definite time. (1) An instrument is payable at a definite time if by its terms it is payable:

(a) on or before a stated date or at a fixed period after a stated date; or

(b) at a fixed period after sight; or

(c) at a definite time subject to any acceleration; or

(d) at a definite time subject to extension at the option of the holder, or to extension to a further definite time at the option of the maker or acceptor or automatically upon or after a specified act or event.

(2) An instrument which by its terms is otherwise payable only upon an act or event uncertain as to time of occurrence is not payable at a definite time even though the act or event has occurred.

History: **En. Sec. 3-109, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-109.**

30-3-110. Payable to order. (1) An instrument is payable to order when by its terms it is payable to the order or assigns of any person therein specified with reasonable certainty, or to him or his order, or when it is conspicuously designated on its face as "exchange" or the like and names a payee. It may be payable to the order of:

(a) the maker or drawer; or

(b) the drawee; or

(c) a payee who is not maker, drawer or drawee; or

(d) two or more payees together or in the alternative; or

(e) an estate, trust or fund, in which case it is payable to the order of the epresentative of such estate, trust or fund or his successors; or

(f) an office, or an officer by his title as such in which case it is payable o the principal but the incumbent of the office or his successors may act as he or they were the holder; or

(g) a partnership or unincorporated association, in which case it is payable to the partnership or association and may be endorsed or transferred by any person thereto authorized.

(2) An instrument not payable to order is not made so payable by such ords as "payable upon return of this instrument properly endorsed".

(3) An instrument made payable both to order and to bearer is payable o order unless the bearer words are handwritten or typewritten.

History: **En. Sec. 3-110, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-110.**

30-3-111. Payable to bearer. An instrument is payable to bearer hen by its terms it is payable to:

(a) bearer or the order of bearer; or

(b) a specified person or bearer; or

(c) "cash" or the order of "cash", or any other indication which does not urport to designate a specific payee.

History: **En. Sec. 3-111, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-111.**

30-3-112. Terms and omissions not affecting negotiability. (1) he negotiability of an instrument is not affected by:

(a) the omission of a statement of any consideration or of the place where he instrument is drawn or payable; or

(b) a statement that collateral has been given to secure obligations either n the instrument or otherwise of an obligor on the instrument or in the case f default on those obligations the holder may realize on or dispose of the ollateral; or

(c) a promise or power to maintain or protect collateral or to give addional collateral; or

(d) a term authorizing a confession of judgment on the instrument if it not paid when due; or

(e) a term purporting to waive the benefit of any law intended for the dvantage or protection of any obligor; or

(f) a term in a draft providing that the payee by endorsing or cashing it cknowledges full satisfaction of an obligation of the drawer; or

(g) a statement in a draft drawn in a set of parts (30-3-801) to the effect hat the order is effective only if no other part has been honored.

(2) Nothing in this section shall validate any term which is otherwise illeal.

History: **En. Sec. 3-112, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-112.**

30-3-113. Seal. An instrument otherwise negotiable is within this chaper even though it is under a seal.

History: **En. Sec. 3-113, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-113.**

30-3-114. Date, antedating, postdating. (1) The negotiability of an nstrument is not affected by the fact that it is undated, antedated or postated.

(2) Where an instrument is antedated or postdated the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date.

(3) Where the instrument or any signature thereon is dated, the date is presumed to be correct.

History: **En. Sec. 3-114, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-114.**

30-3-115. Incomplete instruments. (1) When a paper whose contents at the time of signing show that it is intended to become an instrument is signed while still incomplete in any necessary respect it cannot be enforced until completed, but when it is completed in accordance with authority given it is effective as completed.

(2) If the completion is unauthorized the rules as to material alteration apply (30-3-407), even though the paper was not delivered by the maker or drawer; but the burden of establishing that any completion is unauthorized is on the party so asserting.

History: **En. Sec. 3-115, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-115.**

30-3-116. Instruments payable to two or more persons. An instrument payable to the order of two or more persons:

(a) if in the alternative is payable to any one of them and may be negotiated, discharged or enforced by any of them who has possession of it;

(b) if not in the alternative is payable to all of them and may be negotiated, discharged or enforced only by all of them.

History: **En. Sec. 3-116, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-116.**

30-3-117. Instruments payable with words of description. An instrument made payable to a named person with the addition of words describing him:

(a) as agent or officer of a specified person is payable to his principal but the agent or officer may act as if he were the holder;

(b) as any other fiduciary for a specified person or purpose is payable to the payee and may be negotiated, discharged or enforced by him;

(c) in any other manner is payable to the payee unconditionally and the additional words are without effect on subsequent parties.

History: **En. Sec. 3-117, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-117.**

30-3-118. Ambiguous terms and rules of construction. The following rules apply to every instrument:

(a) Where there is doubt whether the instrument is a draft or a note the holder may treat it as either. A draft drawn on the drawer is effective as a note.

(b) Handwritten terms control typewritten and printed terms, and typewritten control printed.

(c) Words control figures except that if the words are ambiguous figures control.

(d) Unless otherwise specified a provision for interest means interest at the judgment rate at the place of payment from the date of the instrument, or if it is undated from the date of issue.

(e) Unless the instrument otherwise specifies two or more persons who sign as maker, acceptor or drawer or endorser and as a part of the same ransaction are jointly and severally liable even though the instrument con- ains such words as "I promise to pay".

(f) Unless otherwise specified consent to extension authorizes a single xtension for not longer than the original period. A consent to extension, xpressed in the instrument, is binding on secondary parties and accommoda- ion makers. A holder may not exercise his option to extend an instrument ver the objection of a maker or acceptor or other party who in accordance ith 30-3-604 tenders full payment when the instrument is due.

History: **En. Sec. 3-118, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-118.**

30-3-119. Other writings affecting instrument. (1) As between the bligor and his immediate obligee or any transferee the terms of an instru- ent may be modified or affected by any other written agreement executed s a part of the same transaction, except that a holder in due course is not ffected by any limitation of his rights arising out of the separate written greement if he had no notice of the limitation when he took the instrument.

(2) A separate agreement does not affect the negotiability of an instru- ent.

History: **En. Sec. 3-119, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-119.**

30-3-120. Instruments "payable through" bank. An instrument hich states that it is "payable through" a bank or the like designates that ank as a collecting bank to make presentment but does not of itself author- ze the bank to pay the instrument.

History: **En. Sec. 3-120, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-120.**

30-3-121. Instruments payable at bank. A note or acceptance hich states that it is payable at a bank is not of itself an order or authoriza- on to the bank to pay it.

History: **En. Sec. 3-121, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-121.**

30-3-122. Accrual of cause of action. (1) A cause of action against maker or an acceptor accrues:

(a) in the case of a time instrument on the day after maturity;

(b) in the case of a demand instrument upon its date or, if no date is ated, on the date of issue.

(2) A cause of action against the obligor of a demand or time certificate f deposit accrues upon demand, but demand on a time certificate may not e made until on or after the date of maturity.

(3) A cause of action against a drawer of a draft or an endorser of any nstrument accrues upon demand following dishonor of the instrument. Notice of dishonor is a demand.

(4) Unless an instrument provides otherwise, interest runs at the rate rovided by law for a judgment:

(a) in the case of a maker, acceptor or other primary obligor of a demand nstrument, from the date of demand;

(b) in all other cases from the date of accrual of the cause of action.

History: **En. Sec. 3-122, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-122.**

30-3-123. Holder's power to sue on overdue negotiable instru- ents — transfer. A holder of overdue bills of exchange and promissory notes, as described in 30-3-104 may sue all the parties thereto collectively or severally, but if any of the parties thereto who are not primarily liable for the payment tender the amount of principal, interest, and costs thereon, the holder shall transfer the paper. If a judgment be rendered thereon, the holder shall assign the judgment to such party so making the tender, and in case of refusal he may be compelled to do so by summary proceedings instituted for that purpose in the district court of the district in which he resides.

History: En. Sec. 593, C. Civ. Proc. 1895; re-en. Sec. 6500, Rev. C. 1907; re-en. Sec. 9092, R.C.M. 1921; re-en. Sec. 9092, R.C.M. 1935; amd. Sec. 18, Ch. 265, L. 1977; R.C.M. 1947, 93-2830.

Part 2

Transfer and Negotiation

30-3-201. Transfer — right to endorsement. (1) Transfer of an instrument vests in the transferee such rights as the transferor has therein, except that a transferee who has himself been a party to any fraud or illegality affecting the instrument or who as a prior holder had notice of a defense or claim against it cannot improve his position by taking from a later holder in due course.

(2) A transfer of a security interest in an instrument vests the foregoing rights in the transferee to the extent of the interest transferred.

(3) Unless otherwise agreed any transfer for value of an instrument not then payable to bearer gives the transferee the specifically enforceable right to have the unqualified endorsement of the transferor. Negotiation takes effect only when the endorsement is made and until that time there is no presumption that the transferee is the owner.

History: En. Sec. 3-201, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-201.

30-3-202. Negotiation. (1) Negotiation is the transfer of an instrument in such form that the transferee becomes a holder. If the instrument is payable to order it is negotiated by delivery with any necessary endorsement; if payable to bearer it is negotiated by delivery.

(2) An endorsement must be written by or on behalf of the holder and on the instrument or on a paper so firmly affixed thereto as to become a part thereof.

(3) An endorsement is effective for negotiation only when it conveys the entire instrument or any unpaid residue. If it purports to be of less it operates only as a partial assignment.

(4) Words of assignment, condition, waiver, guaranty, limitation or disclaimer of liability and the like accompanying an endorsement do not affect its character as an endorsement.

History: En. Sec. 3-202, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-202.

30-3-203. Wrong or misspelled name. Where an instrument is made payable to a person under a misspelled name or one other than his own he may endorse in that name or his own or both; but signature in both names may be required by a person paying or giving value for the instrument.

History: En. Sec. 3-203, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-203.

30-3-204. Special endorsement — blank endorsement. (1) A special endorsement specifies the person to whom or to whose order it makes

e instrument payable. Any instrument specially endorsed becomes payable
the order of the special endorsee and may be further negotiated only by
s endorsement.

(2) An endorsement in blank specifies no particular endorsee and may
nsist of a mere signature. An instrument payable to order and endorsed in
ank becomes payable to bearer and may be negotiated by delivery alone
ntil specially endorsed.

(3) The holder may convert a blank endorsement into a special endorse-
ent by writing over the signature of the endorser in blank any contract con-
stent with the character of the endorsement.

History: **En. Sec. 3-204, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-204.**

30-3-205. Restrictive endorsements. An endorsement is restrictive
hich either:

(a) is conditional; or

(b) purports to prohibit further transfer of the instrument; or

(c) includes the words "for collection", "for deposit", "pay any bank", or
ke terms signifying a purpose of deposit or collection; or

(d) otherwise states that it is for the benefit or use of the endorser or of
nother person.

History: **En. Sec. 3-205, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-205.**

30-3-206. Effect of restrictive endorsement. (1) No restrictive
ndorsement prevents further transfer or negotiation of the instrument.

(2) An intermediary bank, or a payor bank which is not the depositary
ank, is neither given notice nor otherwise affected by a restrictive endorse-
ent of any person except the bank's immediate transferor or the person
esenting for payment.

(3) Except for an intermediary bank, any transferee under an endorse-
ent which is conditional or includes the words "for collection", "for
eposit", "pay any bank", or like terms (subparagraphs (a) and (c) of
-3-205) must pay or apply any value given by him for or on the security
the instrument consistently with the endorsement and to the extent that
does so he becomes a holder for value. In addition such transferee is a
older in due course if he otherwise complies with the requirements of
-3-302 on what constitutes a holder in due course.

(4) The first taker under an endorsement for the benefit of the endorser
another person (subparagraph (d) of 30-3-205) must pay or apply any
lue given by him for or on the security of the instrument consistently with
e endorsement and to the extent that he does so he becomes a holder for
lue. In addition such taker is a holder in due course if he otherwise com-
ies with the requirements of 30-3-302 on what constitutes a holder in due
urse. A later holder for value is neither given notice nor otherwise affected
such restrictive endorsement unless he has knowledge that a fiduciary or
her person has negotiated the instrument in any transaction for his own
enefit or otherwise in breach of duty (subsection (2) of 30-3-304).

History: **En. Sec. 3-206, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-206.**

30-3-207. Negotiation effective although it may be rescinded.
) Negotiation is effective to transfer the instrument although the nego-
ation is:

(a) made by an infant, a corporation exceeding its powers, or any other person without capacity; or

(b) obtained by fraud, duress or mistake of any kind; or

(c) part of an illegal transaction; or

(d) made in breach of duty.

(2) Except as against a subsequent holder in due course such negotiation is in an appropriate case subject to rescission, the declaration of a constructive trust or any other remedy permitted by law.

History: En. Sec. 3-207, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-207.

30-3-208. Reacquisition. Where an instrument is returned to or reacquired by a prior party he may cancel any endorsement which is not necessary to his title and reissue or further negotiate the instrument, but any intervening party is discharged as against the reacquiring party and subsequent holders not in due course and if his endorsement has been canceled is discharged as against subsequent holders in due course as well.

History: En. Sec. 3-208, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-208.

Part 3

Rights of a Holder

30-3-301. Rights of a holder. The holder of an instrument whether or not he is the owner may transfer or negotiate it and, except as otherwise provided in 30-3-603 on payment or satisfaction, discharge it or enforce payment in his own name.

History: En. Sec. 3-301, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-301.

30-3-302. Holder in due course. (1) A holder in due course is a holder who takes the instrument:

(a) for value; and

(b) in good faith; and

(c) without notice that it is overdue or has been dishonored or of any defense against or claim to it on the part of any person.

(2) A payee may be a holder in due course.

(3) A holder does not become a holder in due course of an instrument:

(a) by purchase of it at judicial sale or by taking it under legal process; or

(b) by acquiring it in taking over an estate; or

(c) by purchasing it as part of a bulk transaction not in regular course of business of the transferor.

(4) A purchaser of a limited interest can be a holder in due course only to the extent of the interest purchased.

History: En. Sec. 3-302, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-302.

30-3-303. Taking for value. A holder takes the instrument for value:

(a) to the extent that the agreed consideration has been performed or that he acquires a security interest in or a lien on the instrument otherwise than by legal process; or

(b) when he takes the instrument in payment of or as security for an antecedent claim against any person whether or not the claim is due; or

(c) when he gives a negotiable instrument for it or makes an irrevocable ommitment to a third person.

History: En. Sec. 3-303, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-303.

30-3-304. Notice to purchaser. (1) The purchaser has notice of a aim or defense if:

(a) the instrument is so incomplete, bears such visible evidence of forgery alteration, or is otherwise so irregular as to call into question its validity, rms or ownership or to create an ambiguity as to the party to pay; or

(b) the purchaser has notice that the obligation of any party is voidable whole or in part, or that all parties have been discharged.

(2) The purchaser has notice of a claim against the instrument when he as knowledge that a fiduciary has negotiated the instrument in payment of as security for his own debt or in any transaction for his own benefit or herwise in breach of duty.

(3) The purchaser has notice that an instrument is overdue if he has ason to know:

(a) that any part of the principal amount is overdue or that there is an cured default in payment of another instrument of the same series; or

(b) that acceleration of the instrument has been made; or

(c) that he is taking a demand instrument after demand has been made more than a reasonable length of time after its issue. A reasonable time r a check drawn and payable within the states and territories of the United ates and the District of Columbia is presumed to be 30 days.

(4) Knowledge of the following facts does not of itself give the purchaser tice of a defense or claim:

(a) that the instrument is antedated or postdated;

(b) that it was issued or negotiated in return for an executory promise or companied by a separate agreement, unless the purchaser has notice that defense or claim has arisen from the terms thereof;

(c) that any party has signed for accommodation;

(d) that an incomplete instrument has been completed, unless the puraser has notice of any improper completion;

(e) that any person negotiating the instrument is or was a fiduciary;

(f) that there has been default in payment of interest on the instrument in payment of any other instrument, except one of the same series.

(5) The filing or recording of a document does not of itself constitute tice within the provisions of this chapter to a person who would otherwise a holder in due course.

(6) To be effective notice must be received at such time and in such manr as to give a reasonable opportunity to act on it.

History: En. Sec. 3-304, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-304.

30-3-305. Rights of a holder in due course. To the extent that a lder is a holder in due course he takes the instrument free from:

(1) all claims to it on the part of any person; and

(2) all defenses of any party to the instrument with whom the holder has t dealt except:

(a) infancy, to the extent that it is a defense to a simple contract; and

(b) such other incapacity, or duress, or illegality of the transaction, a renders the obligation of the party a nullity; and

(c) such misrepresentation as has induced the party to sign the instrument with neither knowledge nor reasonable opportunity to obtain knowledg of its character or its essential terms; and

(d) discharge in insolvency proceedings; and

(e) any other discharge of which the holder has notice when he takes th instrument.

History: En. Sec. 3-305, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-305.

30-3-306. Rights of one not holder in due course. Unless he ha the rights of a holder in due course any person takes the instrument subjec to:

(a) all valid claims to it on the part of any person; and

(b) all defenses of any party which would be available in an action on simple contract; and

(c) the defenses of want or failure of consideration, nonperformance o any condition precedent, nondelivery, or delivery for a special purpos (30-3-408); and

(d) the defense that he or a person through whom he holds the instrument acquired it by theft, or that payment or satisfaction to such holde would be inconsistent with the terms of a restrictive endorsement. The claim of any third person to the instrument is not otherwise available as a defense to any party liable thereon unless the third person himself defends the action for such party.

History: En. Sec. 3-306, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-306.

30-3-307. Burden of establishing signatures, defenses and due course. (1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue:

(a) the burden of establishing it is on the party claiming under the signature; but

(b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required.

(2) When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense.

(3) After it is shown that a defense exists a person claiming the rights of a holder in due course has the burden of establishing that he or some person under whom he claims is in all respects a holder in due course.

History: En. Sec. 3-307, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-307.

Part 4

Liability of Parties

30-3-401. Signature. (1) No person is liable on an instrument unless his signature appears thereon.

(2) A signature is made by use of any name, including any trade or ssumed name, upon an instrument, or by any word or mark used in lieu of written signature.

History: **En. Sec. 3-401, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-401.**

30-3-402. Signature in ambiguous capacity. Unless the instrument learly indicates that a signature is made in some other capacity it is an ndorsement.

History: **En. Sec. 3-402, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-402.**

30-3-403. Signature by authorized representative. (1) A signaure may be made by an agent or other representative, and his authority to ake it may be established as in other cases of representation. No particular rm of appointment is necessary to establish such authority.

(2) An authorized representative who signs his own name to an instruent:

(a) is personally obligated if the instrument neither names the person epresented nor shows that the representative signed in a representative apacity;

(b) except as otherwise established between the immediate parties, is ersonally obligated if the instrument names the person represented but does ot show that the representative signed in a representative capacity, or if the strument does not name the person represented but does show that the epresentative signed in a representative capacity.

(3) Except as otherwise established the name of an organization preceded r followed by the name and office of an authorized individual is a signature ade in a representative capacity.

History: **En. Sec. 3-403, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-403.**

30-3-404. Unauthorized signatures. (1) Any unauthorized signature wholly inoperative as that of the person whose name is signed unless he tifies it or is precluded from denying it; but it operates as the signature of e unauthorized signer in favor of any person who in good faith pays the strument or takes it for value.

(2) Any unauthorized signature may be ratified for all purposes of this apter. Such ratification does not of itself affect any rights of the person tifying against the actual signer.

History: **En. Sec. 3-404, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-404.**

30-3-405. Impostors — signature in name of payee. (1) An dorsement by any person in the name of a named payee is effective if:

(a) an impostor by use of the mails or otherwise has induced the maker drawer to issue the instrument to him or his confederate in the name of e payee; or

(b) a person signing as or on behalf of a maker or drawer intends the yee to have no interest in the instrument; or

(c) an agent or employee of the maker or drawer has supplied him with e name of the payee intending the latter to have no such interest.

(2) Nothing in this section shall affect the criminal or civil liability of the erson so endorsing.

History: **En. Sec. 3-405, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-405.**

30-3-406. Negligence contributing to alteration or unauthorized signature. Any person who by his negligence substantially contributes to a material alteration of the instrument or to the making of an unauthorized signature is precluded from asserting the alteration or lack of authority against a holder in due course or against a drawee or other payor who pays the instrument in good faith and in accordance with the reasonable commercial standards of the drawee's or payor's business.

History: En. Sec. 3-406, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-406.

30-3-407. Alteration. (1) Any alteration of an instrument is material which changes the contract of any party thereto in any respect, including any such change in:

(a) the number or relations of the parties; or

(b) an incomplete instrument, by completing it otherwise than as authorized; or

(c) the writing as signed, by adding to it or by removing any part of it.

(2) As against any person other than a subsequent holder in due course:

(a) alteration by the holder which is both fraudulent and material discharges any party whose contract is thereby changed unless that party assents or is precluded from asserting the defense;

(b) no other alteration discharges any party and the instrument may be enforced according to its original tenor, or as to incomplete instruments according to the authority given.

(3) A subsequent holder in due course may in all cases enforce the instrument according to its original tenor, and when an incomplete instrument has been completed, he may enforce it as completed.

History: En. Sec. 3-407, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-407.

30-3-408. Consideration. Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (30-3-305), except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind. Nothing in this section shall be taken to displace any statute outside this code under which a promise is enforceable notwithstanding lack or failure of consideration. Partial failure of consideration is a defense pro tanto whether or not the failure is in an ascertained or liquidated amount.

History: En. Sec. 3-408, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-408.

30-3-409. Draft not an assignment. (1) A check or other draft does not of itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it.

(2) Nothing in this section shall affect any liability in contract, tort or otherwise arising from any letter of credit or other obligation or representation which is not an acceptance.

History: En. Sec. 3-409, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-409.

30-3-410. Definition and operation of acceptance. (1) Acceptance is the drawee's signed engagement to honor the draft as presented. It must written on the draft, and may consist of his signature alone. It becomes erative when completed by delivery or notification.

(2) A draft may be accepted although it has not been signed by the awer or is otherwise incomplete or is overdue or has been dishonored.

(3) Where the draft is payable at a fixed period after sight and the accep- fails to date his acceptance the holder may complete it by supplying a te in good faith.

istory: En. Sec. 3-410, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-410.

30-3-411. Certification of a check. (1) Certification of a check is ceptance. Where a holder procures certification the drawer and all prior dorsers are discharged.

(2) Unless otherwise agreed a bank has no obligation to certify a check.

(3) A bank may certify a check before returning it for lack of proper dorsement. If it does so the drawer is discharged.

istory: En. Sec. 3-411, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-411.

30-3-412. Acceptance varying draft. (1) Where the drawee's prof-ed acceptance in any manner varies the draft as presented the holder may use the acceptance and treat the draft as dishonored in which case the awee is entitled to have his acceptance canceled.

(2) The terms of the draft are not varied by an acceptance to pay at any rticular bank or place in the United States, unless the acceptance states at the draft is to be paid only at such bank or place.

(3) Where the holder assents to an acceptance varying the terms of the aft each drawer and endorser who does not affirmatively assent is dis-arged.

istory: En. Sec. 3-412, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-412.

30-3-413. Contract of maker, drawer and acceptor. (1) The aker or acceptor engages that he will pay the instrument according to its nor at the time of his engagement or as completed pursuant to 30-3-115 on omplete instruments.

(2) The drawer engages that upon dishonor of the draft and any neces-y notice of dishonor or protest he will pay the amount of the draft to the lder or to any endorser who takes it up. The drawer may disclaim this lia-ity by drawing without recourse.

(3) By making, drawing or accepting the party admits as against all bsequent parties including the drawee the existence of the payee and his n capacity to endorse.

istory: En. Sec. 3-413, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-413.

30-3-414. Contract of endorser — order of liability. (1) Unless endorsement otherwise specifies (as by such words as "without recourse") ery endorser engages that upon dishonor and any necessary notice of dis-nor and protest he will pay the instrument according to its tenor at the ne of his endorsement to the holder or to any subsequent endorser who kes it up, even though the endorser who takes it up was not obligated to so.

(2) Unless they otherwise agree endorsers are liable to one another in the order in which they endorse, which is presumed to be the order in which their signatures appear on the instrument.

History: **En. Sec. 3-414, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-414.**

30-3-415. Contract of accommodation party. (1) An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it.

(2) When the instrument has been taken for value before it is due the accommodation party is liable in the capacity in which he has signed even though the taker knows of the accommodation.

(3) As against a holder in due course and without notice of the accommodation oral proof of the accommodation is not admissible to give the accommodation party the benefit of discharges dependent on his character as such. In other cases the accommodation character may be shown by oral proof.

(4) An endorsement which shows that it is not in the chain of title is notice of its accommodation character.

(5) An accommodation party is not liable to the party accommodated, and if he pays the instrument has a right of recourse on the instrument against such party.

History: **En. Sec. 3-415, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-415.**

30-3-416. Contract of guarantor. (1) "Payment guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor without resort by the holder to any other party.

(2) "Collection guaranteed" or equivalent words added to a signature mean that the signer engages that if the instrument is not paid when due he will pay it according to its tenor, but only after the holder has reduced his claim against the maker or acceptor to judgment and execution has been returned unsatisfied, or after the maker or acceptor has become insolvent or it is otherwise apparent that it is useless to proceed against him.

(3) Words of guaranty which do not otherwise specify guarantee payment.

(4) No words of guaranty added to the signature of a sole maker or acceptor affect his liability on the instrument. Such words added to the signature of one of two or more makers or acceptors create a presumption that the signature is for the accommodation of the others.

(5) When words of guaranty are used presentment, notice of dishonor and protest are not necessary to charge the user.

(6) Any guaranty written on the instrument is enforceable notwithstanding any statute of frauds.

History: **En. Sec. 3-416, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-416.**

30-3-417. Warranties on presentment and transfer. (1) Any person who obtains payment or acceptance and any prior transfer or warrants to a person who in good faith pays or accepts that:

(a) he has a good title to the instrument or is authorized to obtain payment or acceptance on behalf of one who has a good title; and

(b) he has no knowledge that the signature of the maker or drawer is unauthorized, except that this warranty is not given by a holder in due course acting in good faith:

(i) to a maker with respect to the maker's own signature; or

(ii) to a drawer with respect to the drawer's own signature, whether or not e drawer is also the drawee; or

(iii) to an acceptor of a draft if the holder in due course took the draft ter the acceptance or obtained the acceptance without knowledge that the awer's signature was unauthorized; and

(c) the instrument has not been materially altered, except that this war- nty is not given by a holder in due course acting in good faith:

(i) to the maker of a note; or

(ii) to the drawer of a draft whether or not the drawer is also the drawee;

(iii) to the acceptor of a draft with respect to an alteration made prior to e acceptance if the holder in due course took the draft after the accep- nce, even though the acceptance provided "payable as originally drawn" or uivalent terms; or

(iv) to the acceptor of a draft with respect to an alteration made after the ceptance.

(2) Any person who transfers an instrument and receives consideration arrants to his transferee and if the transfer is by endorsement to any subse- uent holder who takes the instrument in good faith that:

(a) he has a good title to the instrument or is authorized to obtain pay- ent or acceptance on behalf of one who has a good title and the transfer otherwise rightful; and

(b) all signatures are genuine or authorized; and

(c) the instrument has not been materially altered; and

(d) no defense of any party is good against him; and

(e) he has no knowledge of any insolvency proceeding instituted with spect to the maker or acceptor or the drawer of an unaccepted instrument.

(3) By transferring "without recourse" the transferor limits the obligation ated in subsection (2)(d) to a warranty that he has no knowledge of such defense.

(4) A selling agent or broker who does not disclose the fact that he is act- g only as such gives the warranties provided in this section, but if he makes uch disclosure warrants only his good faith and authority.

History: En. Sec. 3-417, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-417.

30-3-418. Finality of payment or acceptance. Except for recovery bank payments as provided in the Chapter on Bank Deposits and Collec- ons (Chapter 4) and except for liability for breach of warranty on present- ent under the preceding section, payment or acceptance of any instrument final in favor of a holder in due course, or a person who has in good faith hanged his position in reliance on the payment.

History: En. Sec. 3-418, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-418.

30-3-419. Conversion of instrument — innocent representative.
) An instrument is converted when:

(a) a drawee to whom it is delivered for acceptance refuses to return it n demand; or

(b) any person to whom it is delivered for payment refuses on demand ther to pay or to return it; or

(c) it is paid on a forged endorsement.

(2) In an action against a drawee under subsection (1) the measure of the drawee's liability is the face amount of the instrument. In any other action under subsection (1) the measure of liability is presumed to be the face amount of the instrument.

(3) Subject to the provisions of this code concerning restrictive endorsements a representative, including a depositary or collecting bank, who has in good faith and in accordance with the reasonable commercial standards applicable to the business of such representative dealt with an instrument or its proceeds on behalf of one who was not the true owner is not liable in conversion or otherwise to the true owner beyond the amount of any proceeds remaining in his hands.

(4) An intermediary bank or payor bank which is not a depositary bank is not liable in conversion solely by reason of the fact that proceeds of an item endorsed restrictively (30-3-205 and 30-3-206) are not paid or applied consistently with the restrictive endorsement of an endorser other than its immediate transferor.

History: En. Sec. 3-419, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-419.

Part 5

Presentment, Notice of Dishonor, and Protest

30-3-501. When presentment, notice of dishonor, and protest necessary or permissible. (1) Unless excused (30-3-511) presentment is necessary to charge secondary parties as follows:

(a) presentment for acceptance is necessary to charge the drawer and endorsers of a draft where the draft so provides, or is payable elsewhere than at the residence or place of business of the drawee, or its date of payment depends upon such presentment. The holder may at his option present for acceptance any other draft payable at a stated date;

(b) presentment for payment is necessary to charge any endorser;

(c) in the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, presentment for payment is necessary, but failure to make presentment discharges such drawer, acceptor or maker only as stated in 30-3-502(1)(b).

(2) Unless excused (30-3-511):

(a) notice of any dishonor is necessary to charge any endorser;

(b) in the case of any drawer, the acceptor of a draft payable at a bank or the maker of a note payable at a bank, notice of any dishonor is necessary, but failure to give such notice discharges such drawer, acceptor or maker only as stated in 30-3-502(1)(b).

(3) Unless excused (30-3-511) protest of any dishonor is necessary to charge the drawer and endorsers of any draft which on its face appears to be drawn or payable outside of the states and territories of the United States and the District of Columbia. The holder may at his option make protest of any dishonor of any other instrument and in the case of a foreign draft may on insolvency of the acceptor before maturity make protest for better security.

(4) Notwithstanding any provision of this section, neither presentment or notice of dishonor nor protest is necessary to charge an endorser who has ndorsed an instrument after maturity.

History: En. Sec. 3-501, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-501.

30-3-502. Unexcused delay — discharge. (1) Where without excuse ny necessary presentment or notice of dishonor is delayed beyond the time hen it is due:

(a) any endorser is discharged; and

(b) any drawer or the acceptor of a draft payable at a bank or the maker f a note payable at a bank who because the drawee or payor bank becomes nsolvent during the delay is deprived of funds maintained with the drawee r payor bank to cover the instrument may discharge his liability by written ssignment to the holder of his rights against the drawee or payor bank in espect of such funds, but such drawer, acceptor or maker is not otherwise ischarged.

(2) Where without excuse a necessary protest is delayed beyond the time hen it is due any drawer or endorser is discharged.

History: En. Sec. 3-502, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-502.

30-3-503. Time of presentment. (1) Unless a different time is xpressed in the instrument the time for any presentment is determined as ollows:

(a) where an instrument is payable at or a fixed period after a stated date ny presentment for acceptance must be made on or before the date it is ayable;

(b) where an instrument is payable after sight it must either be presented or acceptance or negotiated within a reasonable time after date or issue hichever is later;

(c) where an instrument shows the date on which it is payable presentment for payment is due on that date;

(d) where an instrument is accelerated presentment for payment is due ithin a reasonable time after the acceleration;

(e) with respect to the liability of any secondary party presentment for cceptance or payment of any other instrument is due within a reasonable me after such party becomes liable thereon.

(2) A reasonable time for presentment is determined by the nature of the nstrument, any usage of banking or trade and the facts of the particular ase. In the case of an uncertified check which is drawn and payable within ne United States and which is not a draft drawn by a bank the following re presumed to be reasonable periods within which to present for payment r to initiate bank collection:

(a) with respect to the liability of the drawer, 30 days after date or issue hichever is later; and

(b) with respect to the liability of an endorser, 7 days after his endorsement.

(3) Where any presentment is due on a day which is not a full business ay for either the person making presentment or the party to pay or accept, resentment is due on the next following day which is a full business day for oth parties.

(4) Presentment to be sufficient must be made at a reasonable hour, and if at a bank during its banking day.

History: En. Sec. 3-503, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-503.

30-3-504. How presentment made. (1) Presentment is a demand for acceptance or payment made upon the maker, acceptor, drawee or other payor by or on behalf of the holder.

(2) Presentment may be made:

(a) by mail, in which event the time of presentment is determined by the time of receipt of the mail; or

(b) through a clearinghouse; or

(c) at the place of acceptance or payment specified in the instrument or if there be none at the place of business or residence of the party to accept or pay. If neither the party to accept or pay nor anyone authorized to act for him is present or accessible at such place presentment is excused.

(3) It may be made:

(a) to any one of two or more makers, acceptors, drawees or other payors; or

(b) to any person who has authority to make or refuse the acceptance or payment.

(4) A draft accepted or a note made payable at a bank in the United States must be presented at such bank.

(5) In the cases described in 30-4-210 presentment may be made in the manner and with the result stated in that section.

History: En. Sec. 3-504, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-504.

30-3-505. Rights of party to whom presentment is made. (1) The party to whom presentment is made may without dishonor require:

(a) exhibition of the instrument; and

(b) reasonable identification of the person making presentment and evidence of his authority to make it if made for another; and

(c) that the instrument be produced for acceptance or payment at a place specified in it, or if there be none at any place reasonable in the circumstances; and

(d) a signed receipt on the instrument for any partial or full payment and its surrender upon full payment.

(2) Failure to comply with any such requirement invalidates the presentment but the person presenting has a reasonable time in which to comply and the time for acceptance or payment runs from the time of compliance.

History: En. Sec. 3-505, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-505.

30-3-506. Time allowed for acceptance or payment. (1) Acceptance may be deferred without dishonor until the close of the next business day following presentment. The holder may also in a good faith effort to obtain acceptance and without either dishonor of the instrument or discharge of secondary parties allow postponement of acceptance for an additional business day.

(2) Except as a longer time is allowed in the case of documentary drafts drawn under a letter of credit, and unless an earlier time is agreed to by the party to pay, payment of an instrument may be deferred without dishonor

nding reasonable examination to determine whether it is properly payable, t payment must be made in any event before the close of business on the y of presentment.

History: En. Sec. 3-506, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-506.

30-3-507. Dishonor — holder's right of recourse — term allow-g re-presentment. (1) An instrument is dishonored when:

(a) a necessary or optional presentment is duly made and due acceptance payment is refused or cannot be obtained within the prescribed time or case of bank collections the instrument is seasonably returned by the mid-ght deadline (30-4-301); or

(b) presentment is excused and the instrument is not duly accepted or id.

(2) Subject to any necessary notice of dishonor and protest, the holder s upon dishonor an immediate right of recourse against the drawers and dorsers.

(3) Return of an instrument for lack of proper endorsement is not dis-nor.

(4) A term in a draft or an endorsement thereof allowing a stated time r re-presentment in the event of any dishonor of the draft by nonacceptace a time draft or by nonpayment if a sight draft gives the holder as against y secondary party bound by the term an option to waive the dishonor ithout affecting the liability of the secondary party and he may present ain up to the end of the stated time.

History: En. Sec. 3-507, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-507.

30-3-508. Notice of dishonor. (1) Notice of dishonor may be given to y person who may be liable on the instrument by or on behalf of the lder or any party who has himself received notice, or any other party who n be compelled to pay the instrument. In addition an agent or bank in hose hands the instrument is dishonored may give notice to his principal customer or to another agent or bank from which the instrument was ceived.

(2) Any necessary notice must be given by a bank before its midnight adline and by any other person before midnight of the third business day ter dishonor or receipt of notice of dishonor.

(3) Notice may be given in any reasonable manner. It may be oral or ritten and in any terms which identify the instrument and state that it has en dishonored. A misdescription which does not mislead the party notified es not vitiate the notice. Sending the instrument bearing a stamp, ticket writing stating that acceptance or payment has been refused or sending notice of debit with respect to the instrument is sufficient.

(4) Written notice is given when sent although it is not received.

(5) Notice to one partner is notice to each although the firm has been issolved.

(6) When any party is in insolvency proceedings instituted after the issue the instrument notice may be given either to the party or to the repre-ntative of his estate.

(7) When any party is dead or incompetent notice may be sent to his last nown address or given to his personal representative.

(8) Notice operates for the benefit of all parties who have rights on th instrument against the party notified.

History: En. Sec. 3-508, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-508.

30-3-509. Protest — noting for protest. (1) A protest is a certificat of dishonor made under the hand and seal of a United States consul or vice consul or a notary public or other person authorized to certify dishonor b the law of the place where dishonor occurs. It may be made upon informatio satisfactory to such person.

(2) The protest must identify the instrument and certify either that du presentment has been made or the reason why it is excused and that th instrument has been dishonored by nonacceptance or nonpayment.

(3) The protest may also certify that notice of dishonor has been give to all parties or to specified parties.

(4) Subject to subsection (5) any necessary protest is due by the tim that notice of dishonor is due.

(5) If, before protest is due, an instrument has been noted for protest b the officer to make protest, the protest may be made at any time thereafte as of the date of the noting.

History: En. Sec. 3-509, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-509.

30-3-510. Evidence of dishonor and notice of dishonor. The following are admissible as evidence and create a presumption of dishonor and of any notice of dishonor therein shown:

(a) a document regular in form as provided in the preceding section which purports to be a protest;

(b) the purported stamp or writing of the drawee, payor bank or presenting bank on the instrument or accompanying it stating that acceptance or payment has been refused for reasons consistent with dishonor;

(c) any book or record of the drawee, payor bank, or any collecting bank kept in the usual course of business which shows dishonor, even though there is no evidence of who made the entry.

History: En. Sec. 3-510, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-510.

30-3-511. Waived or excused presentment, protest or notice of dishonor or delay therein. (1) Delay in presentment, protest or notice of dishonor is excused when the party is without notice that it is due or when the delay is caused by circumstances beyond his control and he exercises reasonable diligence after the cause of the delay ceases to operate.

(2) Presentment or notice or protest as the case may be is entirely excused when:

(a) the party to be charged has waived it expressly or by implication either before or after it is due; or

(b) such party has himself dishonored the instrument or has countermanded payment or otherwise has no reason to expect or right to require that the instrument be accepted or paid; or

(c) by reasonable diligence the presentment or protest cannot be made or the notice given.

(3) Presentment is also entirely excused when:

(a) the maker, acceptor or drawee of any instrument except a documen- ry draft is dead or in insolvency proceedings instituted after the issue of e instrument; or

(b) acceptance or payment is refused but not for want of proper present- ent.

(4) Where a draft has been dishonored by nonacceptance a later present- ent for payment and any notice of dishonor and protest for nonpayment re excused unless in the meantime the instrument has been accepted.

(5) A waiver of protest is also a waiver of presentment and of notice of ishonor even though protest is not required.

(6) Where a waiver of presentment or notice or protest is embodied in the strument itself it is binding upon all parties; but where it is written above e signature of an endorser it binds him only.

History: En. Sec. 3-511, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-511.

Part 6

Discharge

30-3-601. Discharge of parties. (1) The extent of the discharge of ny party from liability on an instrument is governed by the sections on:

(a) payment or satisfaction (30-3-603); or

(b) tender of payment (30-3-604); or

(c) cancellation or renunciation (30-3-605); or

(d) impairment of right of recourse or of collateral (30-3-606); or

(e) reacquisition of the instrument by a prior party (30-3-208); or

(f) fraudulent and material alteration (30-3-407); or

(g) certification of a check (30-3-411); or

(h) acceptance varying a draft (30-3-412); or

(i) unexcused delay in presentment or notice of dishonor or protest 30-3-502).

(2) Any party is also discharged from his liability on an instrument to nother party by any other act or agreement with such party which would ischarge his simple contract for the payment of money.

(3) The liability of all parties is discharged when any party who has him- elf no right of action or recourse on the instrument:

(a) reacquires the instrument in his own right; or

(b) is discharged under any provision of this chapter, except as otherwise rovided with respect to discharge for impairment of recourse or of collateral 30-3-606).

History: En. Sec. 3-601, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-601.

30-3-602. Effect of discharge against holder in due course. No ischarge of any party provided by this chapter is effective against a subse- uent holder in due course unless he has notice thereof when he takes the strument.

History: En. Sec. 3-602, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-602.

30-3-603. Payment or satisfaction. (1) The liability of any party is ischarged to the extent of his payment or satisfaction to the holder even though it is made with knowledge of a claim of another person to the instrument unless prior to such payment or satisfaction the person making th claim either supplies indemnity deemed adequate by the party seeking th discharge or enjoins payment or satisfaction by order of a court of competen jurisdiction in an action in which the adverse claimant and the holder ar parties. This subsection does not, however, result in the discharge of the liability:

(a) of a party who in bad faith pays or satisfies a holder who acquire the instrument by theft or who (unless having the rights of a holder in du course) holds through one who so acquired it; or

(b) of a party (other than an intermediary bank or a payor bank whic is not a depositary bank) who pays or satisfies the holder of an instrumen which has been restrictively endorsed in a manner not consistent with th terms of such restrictive endorsement.

(2) Payment or satisfaction may be made with the consent of the holde by any person including a stranger to the instrument. Surrender of th instrument to such a person gives him the rights of a transferee (30-3-201).

History: **En. Sec. 3-603, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-603.**

30-3-604. Tender of payment. (1) Any party making tender of ful payment to a holder when or after it is due is discharged to the extent o all subsequent liability for interest, costs and attorney's fees.

(2) The holder's refusal of such tender wholly discharges any party wh has a right of recourse against the party making the tender.

(3) Where the maker or acceptor of an instrument payable otherwise tha on demand is able and ready to pay at every place of payment specified i the instrument when it is due, it is equivalent to tender.

History: **En. Sec. 3-604, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-604.**

30-3-605. Cancellation and renunciation. (1) The holder of a instrument may even without consideration discharge any party:

(a) in any manner apparent on the face of the instrument or the endorsement, as by intentionally canceling the instrument or the party's signature by destruction or mutilation, or by striking out the party's signature; or

(b) by renouncing his rights by a writing signed and delivered or by surrender of the instrument to the party to be discharged.

(2) Neither cancellation nor renunciation without surrender of the instrument affects the title thereto.

History: **En. Sec. 3-605, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-605.**

30-3-606. Impairment of recourse or of collateral. (1) The holder discharges any party to the instrument to the extent that without such party's consent the holder:

(a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor with respect to any such person does not discharge any party as to whom presentment, protest or notice of dishonor is effective or unnecessary; or

(b) unjustifiably impairs any collateral for the instrument given by or on half of the party or any person against whom he has a right of recourse.

(2) By express reservation of rights against a party with a right of course the holder preserves:

(a) all his rights against such party as of the time when the instrument as originally due; and

(b) the right of the party to pay the instrument as of that time; and

(c) all rights of such party to recourse against others.

History: **En. Sec. 3-606, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-606.**

Part 7

Advice of International Sight Draft

30-3-701. Letter of advice of international sight draft. (1) A etter of advice" is a drawer's communication to the drawee that a described aft has been drawn.

(2) Unless otherwise agreed when a bank receives from another bank a tter of advice of an international sight draft the drawee bank may immedi- ely debit the drawer's account and stop the running of interest pro tanto. ch a debit and any resulting credit to any account covering outstanding afts leaves in the drawer full power to stop payment or otherwise dispose the amount and creates no trust or interest in favor of the holder.

(3) Unless otherwise agreed and except where a draft is drawn under a edit issued by the drawee, the drawee of an international sight draft owes e drawer no duty to pay an unadvised draft but if it does so and the draft genuine, may appropriately debit the drawer's account.

History: **En. Sec. 3-701, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-701.**

Part 8

Miscellaneous

30-3-801. Drafts in a set. (1) Where a draft is drawn in a set of parts, ch of which is numbered and expressed to be an order only if no other part s been honored, the whole of the parts constitutes one draft but a taker any part may become a holder in due course of the draft.

(2) Any person who negotiates, endorses or accepts a single part of a aft drawn in a set thereby becomes liable to any holder in due course of at part as if it were the whole set, but as between different holders in due urse to whom different parts have been negotiated the holder whose title st accrues has all rights to the draft and its proceeds.

(3) As against the drawee the first presented part of a draft drawn in a t is the part entitled to payment, or if a time draft to acceptance and pay- ent. Acceptance of any subsequently presented part renders the drawee lia- e thereon under subsection (2). With respect both to a holder and to the

drawer payment of a subsequently presented part of a draft payable at sigh has the same effect as payment of a check notwithstanding an effective sto order (30-4-407).

(4) Except as otherwise provided in this section, where any part of a draf in a set is discharged by payment or otherwise the whole draft is discharged.

History: **En. Sec. 3-801, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-801.**

30-3-802. Effect of instrument on obligation for which it i given. (1) Unless otherwise agreed where an instrument is taken for a underlying obligation:

(a) the obligation is pro tanto discharged if a bank is drawer, maker o acceptor of the instrument and there is no recourse on the instrumen against the underlying obligor; and

(b) in any other case the obligation is suspended pro tanto until th instrument is due or if it is payable on demand until its presentment. If th instrument is dishonored action may be maintained on either the instrumen or the obligation; discharge of the underlying obligor on the instrument als discharges him on the obligation.

(2) The taking in good faith of a check which is not postdated does no of itself so extend the time on the original obligation as to discharge a surety

History: **En. Sec. 3-802, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-802.**

30-3-803. Notice to third party. Where a defendant is sued fo breach of an obligation for which a third person is answerable over unde this chapter he may give the third person written notice of the litigation, an the person notified may then give similar notice to any other person who i answerable over to him under this chapter. If the notice states that th person notified may come in and defend and that if the person notified doe not do so he will in any action against him by the person giving the notic be bound by any determination of fact common to the two litigations, ther unless after seasonable receipt of the notice the person notified does come i and defend he is so bound.

History: **En. Sec. 3-803, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-803.**

30-3-804. Lost, destroyed or stolen instruments. The owner of a instrument which is lost, whether by destruction, theft or otherwise, ma maintain an action in his own name and recover from any party liabl thereon upon due proof of his ownership, the facts which prevent his production of the instrument and its terms. The court may require security indemnifying the defendant against loss by reason of further claims on th instrument.

History: **En. Sec. 3-804, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-804.**

30-3-805. Instruments not payable to order or to bearer. Thi chapter applies to any instrument whose terms do not preclude transfer an which is otherwise negotiable within this chapter but which is not payable t order or to bearer, except that there can be no holder in due course of suc an instrument.

History: **En. Sec. 3-805, Ch. 264, L. 1963; R.C.M. 1947, 87A-3-805.**

CHAPTER 4

UNIFORM COMMERCIAL CODE
BANK DEPOSITS AND COLLECTIONS

Part 1 — General Provisions and Definitions

ction

-4-101. Short title.
-4-102. Applicability.
-4-103. Variation by agreement — measure of damages — certain action constituting ordinary care.
-4-104. Definitions and index of definitions.
-4-105. "Depositary bank" — "intermediary bank" — "collecting bank" — "payor bank" — "presenting bank" — "remitting bank".
-4-106. Separate office of a bank.
-4-107. Time of receipt of items.
-4-108. Delays.
-4-109. Process of posting.

Part 2 — Collection of Items
Depositary and Collecting Banks

4-201. Presumption and duration of agency status of collecting banks and provisional status of credits — applicability of chapter — item endorsed "pay any bank".
4-202. Responsibility for collection — when action seasonable.
4-203. Effect of instructions.
4-204. Methods of sending and presenting — sending direct to payor bank.
4-205. Supplying missing endorsement — no notice from prior endorsement.
4-206. Transfer between banks.
4-207. Warranties of customer and collecting bank on transfer or presentment of items — time for claims.
4-208. Security interest of collecting bank in items, accompanying documents and proceeds.
4-209. When bank gives value for purposes of holder in due course.
4-210. Presentment by notice of item not payable by, through or at a bank — liability of secondary parties.
4-211. Media of remittance — provisional and final settlement in remittance cases.
4-212. Right of charge-back or refund.
4-213. Final payment of item by payor bank — when provisional debits and credits become final — when certain credits become available for withdrawal.
4-214. Insolvency and preference.

Part 3 — Collection of Items
Payor Banks

4-301. Deferred posting — recovery of payment by return of items — time of dishonor.
4-302. Payor bank's responsibility for late return of item.
4-303. When items subject to notice, stop order, legal process or setoff — order in which items may be charged or certified.

Part 4 — Relationship Between Payor Bank
and Its Customer

4-401. When bank may charge customer's account.
4-402. Bank's liability to customer for wrongful dishonor.
4-403. Customer's right to stop payment — burden of proof of loss.
4-404. Bank not obligated to pay check more than six months old.
4-405. Death or incompetence of customer.
4-406. Customer's duty to discover and report unauthorized signature or alteration.
4-407. Payor bank's right to subrogation on improper payment.

Part 5 — Collection of Documentary Drafts

30-4-501. Handling of documentary drafts — duty to send for presentment and to noti customer of dishonor.
30-4-502. Presentment of "on arrival" drafts.
30-4-503. Responsibility of presenting bank for documents and goods — report of reasons f dishonor — referee in case of need.
30-4-504. Privilege of presenting bank to deal with goods — security interest for expenses.

Part 1

General Provisions and Definitions

30-4-101. Short title. This chapter shall be known and may be cite as Uniform Commercial Code—Bank Deposits and Collections.

History: En. Sec. 4-101, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-101.

30-4-102. Applicability. (1) To the extent that items within this chapter are also within the scope of Chapters 3 and 8, they are subject to th provisions of those chapters. In the event of conflict the provisions of thi chapter govern those of Chapter 3 but the provisions of Chapter 8 gover those of this chapter.

(2) The liability of a bank for action or nonaction with respect to an item handled by it for purposes of presentment, payment or collection is governed by the law of the place where the bank is located. In the case of actio or nonaction by or at a branch or separate office of a bank, its liability i governed by the law of the place where the branch or separate office is located.

History: En. Sec. 4-102, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-102.

30-4-103. Variation by agreement — measure of damages — certain action constituting ordinary care. (1) The effect of the provisions of this chapter may be varied by agreement except that no agreemen can disclaim a bank's responsibility for its own lack of good faith or failur to exercise ordinary care or can limit the measure of damages for such lac or failure; but the parties may by agreement determine the standards b which such responsibility is to be measured if such standards are not manifestly unreasonable.

(2) Federal Reserve regulations and operating letters, clearinghouse rules and the like, have the effect of agreements under subsection (1), whether o not specifically assented to by all parties interested in items handled.

(3) Action or nonaction approved by this chapter or pursuant to Federa Reserve regulations or operating letters constitutes the exercise of ordinar care and, in the absence of special instructions, action or nonaction consistent with clearinghouse rules and the like or with a general banking usage no disapproved by this chapter, prima facie constitutes the exercise of ordinar care.

(4) The specification or approval of certain procedures by this chapte does not constitute disapproval of other procedures which may be reasonabl under the circumstances.

(5) The measure of damages for failure to exercise ordinary care in han- ing an item is the amount of the item reduced by an amount which could t have been realized by the use of ordinary care, and where there is bad ith it includes other damages, if any, suffered by the party as a proximate nsequence.

History: En. Sec. 4-103, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-103.

30-4-104. Definitions and index of definitions. (1) In this chapter less the context otherwise requires:

(a) “Account” means any account with a bank and includes a checking, ne, interest or savings account;

(b) “Afternoon” means the period of a day between noon and midnight;

(c) “Banking day” means that part of any day on which a bank is open the public for carrying on substantially all of its banking functions;

(d) “Clearinghouse” means any association of banks or other payors regu- rly clearing items;

(e) “Customer” means any person having an account with a bank or for om a bank has agreed to collect items and includes a bank carrying an count with another bank;

(f) “Documentary draft” means any negotiable or nonnegotiable draft th accompanying documents, securities or other papers to be delivered ainst honor of the draft;

(g) “Item” means any instrument for the payment of money even though is not negotiable but does not include money;

(h) “Midnight deadline” with respect to a bank is midnight on its next nking day following the banking day on which it receives the relevant item notice or from which the time for taking action commences to run, which- er is later;

(i) “Properly payable” includes the availability of funds for payment at e time of decision to pay or dishonor;

(j) “Settle” means to pay in cash, by clearinghouse settlement, in a charge credit or by remittance, or otherwise as instructed. A settlement may be her provisional or final;

(k) “Suspends payments” with respect to a bank means that it has been sed by order of the supervisory authorities, that a public officer has been pointed to take it over or that it ceases or refuses to make payments in e ordinary course of business.

(2) Other definitions applying to this chapter and the sections in which ey appear are:

‘Collecting bank”. 30-4-105.
‘Depositary bank”. 30-4-105.
‘Intermediary bank”. 30-4-105.
‘Payor bank”. 30-4-105.
‘Presenting bank”. 30-4-105.
‘Remitting bank”. 30-4-105.

(3) The following definitions in other chapters apply to this chapter:

‘Acceptance”. 30-3-410.
‘Certificate of deposit”. 30-3-104.
‘Certification”. 30-3-411.

"Check". 30-3-104.
"Draft". 30-3-104.
"Holder in due course". 30-3-302.
"Notice of dishonor". 30-3-508.
"Presentment". 30-3-504.
"Protest". 30-3-509.
"Secondary party". 30-3-102.

(4) In addition Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

History: **En. Sec. 4-104, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-104.**

30-4-105. "Depositary bank" — "intermediary bank" — "collecting bank" — "payor bank" — "presenting bank" — "remitting bank". In this chapter unless the context otherwise requires:

(a) "Depositary bank" means the first bank to which an item is transferred for collection even though it is also the payor bank;

(b) "Payor bank" means a bank by which an item is payable as drawn or accepted;

(c) "Intermediary bank" means any bank to which an item is transferred in course of collection except the depositary or payor bank;

(d) "Collecting bank" means any bank handling the item for collection except the payor bank;

(e) "Presenting bank" means any bank presenting an item except a payor bank;

(f) "Remitting bank" means any payor or intermediary bank remitting for an item.

History: **En. Sec. 4-105, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-105.**

30-4-106. Separate office of a bank. A branch or separate office of a bank is a separate bank for the purpose of computing the time within which and determining the place at or to which action may be taken or notices or orders shall be given under this chapter and under Chapter 3.

History: **En. Sec. 4-106, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-106.**

30-4-107. Time of receipt of items. (1) For the purpose of allowing time to process items, prove balances and make the necessary entries on its books to determine its position for the day, a bank may fix an afternoon hour of 2 p.m. or later as a cut-off hour for the handling of money and items and the making of entries on its books.

(2) Any item or deposit of money received on any day after a cut-off hour so fixed or after the close of the banking day may be treated as being received at the opening of the next banking day.

History: **En. Sec. 4-107, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-107.**

30-4-108. Delays. (1) Unless otherwise instructed, a collecting bank in a good faith effort to secure payment may, in the case of specific items and with or without the approval of any person involved, waive, modify or extend time limits imposed or permitted by this code for a period not in excess of an additional banking day without discharge of secondary parties and without liability to its transferor or any prior party.

(2) Delay by a collecting bank or payor bank beyond time limits pre- ribed or permitted by this code or by instructions is excused if caused by terruption of communication facilities, suspension of payments by another ınk, war, emergency conditions or other circumstances beyond the control the bank provided it exercises such diligence as the circumstances require.

History: En. Sec. 4-108, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-108.

30-4-109. Process of posting. The "process of posting" means the ual procedure followed by a payor bank in determining to pay an item and recording the payment including one or more of the following or other eps as determined by the bank:

(a) verification of any signature;
(b) ascertaining that sufficient funds are available;
(c) affixing a "paid" or other stamp;
(d) entering a charge or entry to a customer's account;
(e) correcting or reversing an entry or erroneous action with respect to e item.

istory: En. Sec. 4-109, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-109.

Part 2

Collection of Items
Depositary and Collecting Banks

30-4-201. Presumption and duration of agency status of col- cting banks and provisional status of credits — applicability of apter — item endorsed "pay any bank". (1) Unless a contrary intent early appears and prior to the time that a settlement given by a collecting nk for an item is or becomes final (subsection (3) of 30-4-211 and 30-4-212 d 30-4-213) the bank is an agent or subagent of the owner of the item and y settlement given for the item is provisional. This provision applies gardless of the form of endorsement or lack of endorsement and even ough credit given for the item is subject to immediate withdrawal as of ht or is in fact withdrawn; but the continuance of ownership of an item its owner and any rights of the owner to proceeds of the item are subject rights of a collecting bank such as those resulting from outstanding vances on the item and valid rights of setoff. When an item is handled by nks for purposes of presentment, payment and collection, the relevant ovisions of this chapter apply even though action of parties clearly estab- nes that a particular bank has purchased the item and is the owner of it.

2) After an item has been endorsed with the words "pay any bank" or like, only a bank may acquire the rights of a holder:

a) until the item has been returned to the customer initiating collection;

b) until the item has been specially endorsed by a bank to a person who ıot a bank.

listory: En. Sec. 4-201, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-201.

30-4-202. Responsibility for collection — when action season- le. (1) A collecting bank must use ordinary care in:

(a) presenting an item or sending it for presentment; and

(b) sending notice of dishonor or nonpayment or returning an item other than a documentary draft to the bank's transferor or directly to the depositary bank under subsection (2) of 30-4-212 after learning that the item has not been paid or accepted, as the case may be; and

(c) settling for an item when the bank receives final settlement; and

(d) making or providing for any necessary protest; and

(e) notifying its transferor of any loss or delay in transit within a reasonable time after discovery thereof.

(2) A collecting bank taking proper action before its midnight deadline following receipt of an item, notice or payment acts seasonably; taking proper action within a reasonably longer time may be seasonable but the bank has the burden of so establishing.

(3) Subject to subsection (1)(a), a bank is not liable for the insolvency, neglect, misconduct, mistake or default of another bank or person or for loss or destruction of an item in transit or in the possession of others.

History: En. Sec. 4-202, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-202.

30-4-203. Effect of instructions. Subject to the provisions of Chapter 3 concerning conversion of instruments (30-3-419) and the provisions of both Chapter 3 and this chapter concerning restrictive endorsements only a collecting bank's transferor can give instructions which affect the bank or constitute notice to it and a collecting bank is not liable to prior parties for any action taken pursuant to such instructions or in accordance with any agreement with its transferor.

History: En. Sec. 4-203, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-203.

30-4-204. Methods of sending and presenting — sending direct to payor bank. (1) A collecting bank must send items by reasonably prompt method taking into consideration any relevant instructions, the nature of the item, the number of such items on hand, and the cost of collection involved and the method generally used by it or others to present such items.

(2) A collecting bank may send:

(a) any item direct to the payor bank;

(b) any item to any nonbank payor if authorized by its transferor; and

(c) any item other than documentary drafts to any nonbank payor, if authorized by Federal Reserve regulation or operating letter, clearinghouse rule or the like.

(3) Presentment may be made by a presenting bank at a place where the payor bank has requested that presentment be made.

History: En. Sec. 4-204, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-204.

30-4-205. Supplying missing endorsement — no notice from prior endorsement. (1) A depositary bank which has taken an item for collection may supply any endorsement of the customer which is necessary to title unless the item contains the words "payee's endorsement required" or the like. In the absence of such a requirement a statement placed on the item by the depositary bank to the effect that the item was deposited by a customer or credited to his account is effective as the customer's endorsement.

(2) An intermediary bank, or payor bank which is not a depositary bank, neither given notice nor otherwise affected by a restrictive endorsement of y person except the bank's immediate transferor.

History: **En. Sec. 4-205, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-205.**

30-4-206. Transfer between banks. Any agreed method which entifies the transferor bank is sufficient for the item's further transfer to other bank.

History: **En. Sec. 4-206, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-206.**

30-4-207. Warranties of customer and collecting bank on ansfer or presentment of items — time for claims. (1) Each cus- mer or collecting bank who obtains payment or acceptance of an item and ch prior customer and collecting bank warrants to the payor bank or other yor who in good faith pays or accepts the item that:

(a) he has a good title to the item or is authorized to obtain payment or ceptance on behalf of one who has a good title; and

(b) he has no knowledge that the signature of the maker or drawer is authorized, except that this warranty is not given by any customer or col- ting bank that is a holder in due course and acts in good faith:

(i) to a maker with respect to the maker's own signature; or

(ii) to a drawer with respect to the drawer's own signature, whether or not e drawer is also the drawee; or

(iii) to an acceptor of an item if the holder in due course took the item er the acceptance or obtained the acceptance without knowledge that the awer's signature was unauthorized; and

(c) the item has not been materially altered, except that this warranty is t given by any customer or collecting bank that is a holder in due course d acts in good faith:

(i) to the maker of a note; or

(ii) to the drawer of a draft whether or not the drawer is also the drawee;

(iii) to the acceptor of an item with respect to an alteration made prior to e acceptance if the holder in due course took the item after the acceptance, en though the acceptance provided "payable as originally drawn" or uivalent terms; or

(iv) to the acceptor of an item with respect to an alteration made after the eptance.

(2) Each customer and collecting bank who transfers an item and receives ettlement or other consideration for it warrants to his transferee and to y subsequent collecting bank who takes the item in good faith that:

(a) he has a good title to the item or is authorized to obtain payment or eptance on behalf of one who has a good title and the transfer is other- se rightful; and

(b) all signatures are genuine or authorized; and

(c) the item has not been materially altered; and

(d) no defense of any party is good against him; and

(e) he has no knowledge of any insolvency proceeding instituted with pect to the maker or acceptor or the drawer of an unaccepted item. In addition each customer and collecting bank so transferring an item and receiving a settlement or other consideration engages that upon dishonor and any necessary notice of dishonor and protest he will take up the item.

(3) The warranties and the engagement to honor set forth in the two preceding subsections arise notwithstanding the absence of endorsement or words of guaranty or warranty in the transfer or presentment and a collecting bank remains liable for their breach despite remittance to its transferor. Damages for breach of such warranties or engagement to honor shall not exceed the consideration received by the customer or collecting bank responsible plus finance charges and expenses related to the item, if any.

(4) Unless a claim for breach of warranty under this section is made within a reasonable time after the person claiming learns of the breach, the person liable is discharged to the extent of any loss caused by the delay in making claim.

History: En. Sec. 4-207, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-207.

30-4-208. Security interest of collecting bank in items, accompanying documents and proceeds. (1) A bank has a security interest in an item and any accompanying documents or the proceeds of either:

(a) in case of an item deposited in an account to the extent to which credit given for the item has been withdrawn or applied;

(b) in case of an item for which it has given credit available for withdrawal as of right, to the extent of the credit given whether or not the credit is drawn upon and whether or not there is a right of charge-back; or

(c) if it makes an advance on or against the item.

(2) When credit which has been given for several items received at one time or pursuant to a single agreement is withdrawn or applied in part the security interest remains upon all the items, any accompanying documents or the proceeds of either. For the purpose of this section, credits first given are first withdrawn.

(3) Receipt by a collecting bank of a final settlement for an item is a realization on its security interest in the item, accompanying documents and proceeds. To the extent and so long as the bank does not receive final settlement for the item or give up possession of the item or accompanying documents for purposes other than collection, the security interest continues and is subject to the provisions of Chapter 9 except that:

(a) no security agreement is necessary to make the security interest enforceable (subsection (1)(b) of 30-9-203); and

(b) no filing is required to perfect the security interest; and

(c) the security interest has priority over conflicting perfected security interests in the item, accompanying documents or proceeds.

History: En. Sec. 4-208, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-208.

30-4-209. When bank gives value for purposes of holder in due course. For purposes of determining its status as a holder in due course, the bank has given value to the extent that it has a security interest in an item provided that the bank otherwise complies with the requirements of 30-3-302 on what constitutes a holder in due course.

History: En. Sec. 4-209, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-209.

30-4-210. Presentment by notice of item not payable by, rough or at a bank — liability of secondary parties. (1) Unless herwise instructed, a collecting bank may present an item not payable by, rough or at a bank by sending to the party to accept or pay a written tice that the bank holds the item for acceptance or payment. The notice ust be sent in time to be received on or before the day when presentment due and the bank must meet any requirement of the party to accept or y under 30-3-505 by the close of the bank's next banking day after it ows of the requirement.

(2) Where presentment is made by notice and neither honor nor request r compliance with a requirement under 30-3-505 is received by the close of siness on the day after maturity or in the case of demand items by the ose of business on the third banking day after notice was sent, the present-g bank may treat the item as dishonored and charge any secondary party sending him notice of the facts.

History: En. Sec. 4-210, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-210.

30-4-211. Media of remittance — provisional and final settle-ent in remittance cases. (1) A collecting bank may take in settlement an item:

(a) a check of the remitting bank or of another bank on any bank except e remitting bank; or

(b) a cashier's check or similar primary obligation of a remitting bank hich is a member of or clears through a member of the same clearinghouse group as the collecting bank; or

(c) appropriate authority to charge an account of the remitting bank or another bank with the collecting bank; or

(d) if the item is drawn upon or payable by a person other than a bank, cashier's check, certified check or other bank check or obligation.

(2) If before its midnight deadline the collecting bank properly dishonors remittance check or authorization to charge on itself or presents or for-ards for collection a remittance instrument of or on another bank which is a kind approved by subsection (1) or has not been authorized by it, the llecting bank is not liable to prior parties in the event of the dishonor of ch check, instrument or authorization.

(3) A settlement for an item by means of a remittance instrument or thorization to charge is or becomes a final settlement as to both the person aking and the person receiving the settlement:

(a) if the remittance instrument or authorization to charge is of a kind proved by subsection (1) or has not been authorized by the person receiv-g the settlement and in either case the person receiving the settlement acts asonably before its midnight deadline in presenting, forwarding for collec-on or paying the instrument or authorization,—at the time the remittance strument or authorization is finally paid by the payor by which it is pay-le;

(b) if the person receiving the settlement has authorized remittance by a nbank check or obligation or by a cashier's check or similar primary obli-ation of or a check upon the payor or other remitting bank which is not of a kind approved by subsection (1)(b),—at the time of the receipt of such remittance check or obligation; or

(c) if in a case not covered by subparagraphs (a) or (b) the person receiving the settlement fails to seasonably present, forward for collection, pay or return a remittance instrument or authorization to it to charge before its midnight deadline,—at such midnight deadline.

History: **En. Sec. 4-211, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-211.**

30-4-212. Right of charge-back or refund. (1) If a collecting bank has made provisional settlement with its customer for an item and itself fails by reason of dishonor, suspension of payments by a bank or otherwise to receive a settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer's account or obtain refund from its customer whether or not it is able to return the items if by its midnight deadline or within a longer reasonable time after it learns the facts it returns the item or sends notification of the facts. These rights to revoke, charge back and obtain refund terminate if and when a settlement for the item received by the bank is or becomes final (subsection (3) of 30-4-211 and subsections (2) and (3) of 30-4-213).

(2) Within the time and manner prescribed by this section and 30-4-301, an intermediary or payor bank, as the case may be, may return an unpaid item directly to the depositary bank and may send for collection a draft on the depositary bank and obtain reimbursement. In such case, if the depositary bank has received provisional settlement for the item, it must reimburse the bank drawing the draft and any provisional credits for the item between banks shall become and remain final.

(3) A depositary bank which is also the payor may charge back the amount of an item to its customer's account or obtain refund in accordance with the section governing return of an item received by a payor bank for credit on its books (30-4-301).

(4) The right to charge-back is not affected by:

(a) prior use of the credit given for the item; or

(b) failure by any bank to exercise ordinary care with respect to the item but any bank so failing remains liable.

(5) A failure to charge back or claim refund does not affect other rights of the bank against the customer or any other party.

(6) If credit is given in dollars as the equivalent of the value of an item payable in a foreign currency the dollar amount of any charge-back or refund shall be calculated on the basis of the buying sight rate for the foreign currency prevailing on the day when the person entitled to the charge-back or refund learns that it will not receive payment in ordinary course.

History: **En. Sec. 4-212, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-212.**

30-4-213. Final payment of item by payor bank — when provisional debits and credits become final — when certain credits become available for withdrawal. (1) An item is finally paid by a payor bank when the bank has done any of the following, whichever happens first:

(a) paid the item in cash; or

(b) settled for the item without reserving a right to revoke the settlement nd without having such right under statute, clearinghouse rule or agree-ent; or

(c) completed the process of posting the item to the indicated account of he drawer, maker or other person to be charged therewith; or

(d) made a provisional settlement for the item and failed to revoke the ettlement in the time and manner permitted by statute, clearinghouse rule r agreement. Upon a final payment under subparagraphs (b), (c) or (d) the ayor bank shall be accountable for the amount of the item.

(2) If provisional settlement for an item between the presenting and ayor banks is made through a clearinghouse or by debits or credits in an ccount between them, then to the extent that provisional debits or credits or the item are entered in accounts between the presenting and payor banks r between the presenting and successive prior collecting banks seriatim, they ecome final upon final payment of the item by the payor bank.

(3) If a collecting bank receives a settlement for an item which is or ecomes final (subsection (3) of 30-4-211, subsection (2) of 30-4-213) the ank is accountable to its customer for the amount of the item and any rovisional credit given for the item in an account with its customer becomes inal.

(4) Subject to any right of the bank to apply the credit to an obligation f the customer, credit given by a bank for an item in an account with its ustomer becomes available for withdrawal as of right:

(a) in any case where the bank has received a provisional settlement for he item,—when such settlement becomes final and the bank has had a easonable time to learn that the settlement is final;

(b) in any case where the bank is both a depositary bank and a payor ank and the item is finally paid,—at the opening of the bank's second bank-ng day following receipt of the item.

(5) A deposit of money in a bank is final when made but, subject to any ight of the bank to apply the deposit to an obligation of the customer, the eposit becomes available for withdrawal as of right at the opening of the ank's next banking day following receipt of the deposit.

History: **En. Sec. 4-213, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-213.**

30-4-214. Insolvency and preference. (1) Any item in or coming nto the possession of a payor or collecting bank which suspends payment nd which item is not finally paid shall be returned by the receiver, trustee r agent in charge of the closed bank to the presenting bank or the closed ank's customer.

(2) If a payor bank finally pays an item and suspends payments without aking a settlement for the item with its customer or the presenting bank hich settlement is or becomes final, the owner of the item has a preferred laim against the payor bank.

(3) If a payor bank gives or a collecting bank gives or receives a provi-ional settlement for an item and thereafter suspends payments, the suspen-ion does not prevent or interfere with the settlement becoming final if such inality occurs automatically upon the lapse of certain time or the happening

of certain events (subsection (3) of 30-4-211, subsections (1)(d), (2) and (3 of 30-4-213).

(4) If a collecting bank receives from subsequent parties settlement for a item which settlement is or becomes final and suspends payments withou making a settlement for the item with its customer which is or becomes fina the owner of the item has a preferred claim against such collecting bank.

History: **En. Sec. 4-214, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-214.**

Part 3

Collection of Items — Payor Banks

30-4-301. Deferred posting — recovery of payment by retur of items — time of dishonor. (1) Where an authorized settlement for demand item (other than a documentary draft) received by a payor ban otherwise than for immediate payment over the counter has been mad before midnight of the banking day of receipt the payor bank may revoke th settlement and recover any payment if before it has made final paymen (subsection (1) of 30-4-213) and before its midnight deadline it:

(a) returns the item; or

(b) sends written notice of dishonor or nonpayment if the item is held fo protest or is otherwise unavailable for return.

(2) If a demand item is received by a payor bank for credit on its book it may return such item or send notice of dishonor and may revoke an credit given or recover the amount thereof withdrawn by its customer, if i acts within the time limit and in the manner specified in the preceding subsection.

(3) Unless previous notice of dishonor has been sent an item is dishonored at the time when for purposes of dishonor it is returned or notice sent in accordance with this section.

(4) An item is returned:

(a) as to an item received through a clearinghouse, when it is delivered to the presenting or last collecting bank or to the clearinghouse or is sent or delivered in accordance with its rules; or

(b) in all other cases, when it is sent or delivered to the bank's customer or transferor or pursuant to his instructions.

History: **En. Sec. 4-301, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-301.**

30-4-302. Payor bank's responsibility for late return of item. In the absence of a valid defense such as breach of a presentment warranty (subsection (1) of 30-4-207), settlement effected or the like, if an item is presented on and received by a payor bank the bank is accountable for the amount of:

(a) a demand item other than a documentary draft whether properly payable or not if the bank, in any case where it is not also the depositary bank, retains the item beyond midnight of the banking day of receipt without settling for it or, regardless of whether it is also the depositary bank, does not pay or return the item or send notice of dishonor until after its midnight deadline; or

(b) any other properly payable item unless within the time allowed for ceptance or payment of that item the bank either accepts or pays the item returns it and accompanying documents.

History: En. Sec. 4-302, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-302.

30-4-303. When items subject to notice, stop order, legal process or setoff — order in which items may be charged or certified.) Any knowledge, notice or stop order received by, legal process served pon or setoff exercised by a payor bank, whether or not effective under her rules of law to terminate, suspend or modify the bank's right or duty pay an item or to charge its customer's account for the item, comes too e to so terminate, suspend or modify such right or duty if the knowledge, tice, stop order or legal process is received or served and a reasonable time r the bank to act thereon expires or the setoff is exercised after the bank s done any of the following:

(a) accepted or certified the item;

(b) paid the item in cash;

(c) settled for the item without reserving a right to revoke the settlement d without having such right under statute, clearinghouse rule or agreement;

(d) completed the process of posting the item to the indicated account of e drawer, maker or other person to be charged therewith or otherwise has idenced by examination of such indicated account and by action its decision to pay the item; or

(e) become accountable for the amount of the item under subsection)(d) of 30-4-213 and 30-4-302 dealing with the payor bank's responsibility r late return of items.

(2) Subject to the provisions of subsection (1) items may be accepted, id, certified or charged to the indicated account of its customer in any der convenient to the bank.

History: En. Sec. 4-303, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-303.

Part 4

Relationship Between Payor Bank and Its Customer

30-4-401. When bank may charge customer's account. (1) As ainst its customer, a bank may charge against his account any item which otherwise properly payable from that account even though the charge creates an overdraft.

(2) A bank which in good faith makes payment to a holder may charge e indicated account of its customer according to:

(a) the original tenor of his altered item; or

(b) the tenor of his completed item, even though the bank knows the m has been completed unless the bank has notice that the completion was proper.

History: En. Sec. 4-401, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-401.

30-4-402. Bank's liability to customer for wrongful dishonor. A yor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. When the dishonor occurs through mistake liability is limited to actual damages proved. If so proximately caused and proved damages may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

History: **En. Sec. 4-402, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-402.**

30-4-403. Customer's right to stop payment — burden of proof of loss. (1) A customer may by order to his bank stop payment of any item payable for his account but the order must be received at such time and in such manner as to afford the bank a reasonable opportunity to act on it prior to any action by the bank with respect to the item described in 30-4-303.

(2) An oral order is binding upon the bank only for 14 calendar days unless confirmed in writing within that period. A written order is effective for only 6 months unless renewed in writing.

(3) The burden of establishing the fact and amount of loss resulting from the payment of an item contrary to a binding stop payment order is on the customer.

History: **En. Sec. 4-403, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-403.**

30-4-404. Bank not obligated to pay check more than six months old. A bank is under no obligation to a customer having a checking account to pay a check, other than a certified check, which is presented more than 6 months after its date, but it may charge its customer's account for a payment made thereafter in good faith.

History: **En. Sec. 4-404, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-404.**

30-4-405. Death or incompetence of customer. (1) A payor or collecting bank's authority to accept, pay or collect an item or to account for proceeds of its collection if otherwise effective is not rendered ineffective by incompetence of a customer of either bank existing at the time the item is issued or its collection is undertaken if the bank does not know of an adjudication of incompetence. Neither death nor incompetence of a customer revokes such authority to accept, pay, collect or account until the bank knows of the fact of death or of an adjudication of incompetence and has reasonable opportunity to act on it.

(2) Even with knowledge a bank may for 10 days after the date of death pay or certify checks drawn on or prior to that date unless ordered to stop payment by a person claiming an interest in the account.

History: **En. Sec. 4-405, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-405.**

30-4-406. Customer's duty to discover and report unauthorized signature or alteration. (1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.

(2) If the bank establishes that the customer failed with respect to an m to comply with the duties imposed on the customer by subsection (1) e customer is precluded from asserting against the bank:

(a) his unauthorized signature or any alteration on the item if the bank so establishes that it suffered a loss by reason of such failure; and

(b) an unauthorized signature or alteration by the same wrongdoer on any her item paid in good faith by the bank after the first item and statement as available to the customer for a reasonable period not exceeding 14 calen- r days and before the bank receives notification from the customer of any ch unauthorized signature or alteration.

(3) The preclusion under subsection (2) does not apply if the customer tablishes lack of ordinary care on the part of the bank in paying the m(s).

(4) Without regard to care or lack of care of either the customer or the nk a customer who does not within 1 year from the time the statement and ms are made available to the customer (subsection (1)) discover and report s unauthorized signature or any alteration on the face or back of the item does not within 3 years from that time discover and report any unauthor- ed endorsement is precluded from asserting against the bank such authorized signature or endorsement or such alteration.

(5) If under this section a payor bank has a valid defense against a claim a customer upon or resulting from payment of an item and waives or fails on request to assert the defense the bank may not assert against any col- ting bank or other prior party presenting or transferring the item a claim sed upon the unauthorized signature or alteration giving rise to the cus- mer's claim.

istory: En. Sec. 4-406, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-406.

30-4-407. Payor bank's right to subrogation on improper pay- ent. If a payor bank has paid an item over the stop payment order of the awer or maker or otherwise under circumstances giving a basis for objec- n by the drawer or maker, to prevent unjust enrichment and only to the tent necessary to prevent loss to the bank by reason of its payment of the m, the payor bank shall be subrogated to the rights:

(a) of any holder in due course on the item against the drawer or maker; d

(b) of the payee or any other holder of the item against the drawer or aker either on the item or under the transaction out of which the item ose; and

(c) of the drawer or maker against the payee or any other holder of the m with respect to the transaction out of which the item arose.

istory: En. Sec. 4-407, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-407.

Part 5

Collection of Documentary Drafts

30-4-501. Handling of documentary drafts — duty to send for esentment and to notify customer of dishonor. A bank which takes locumentary draft for collection must present or send the draft and accom- nying documents for presentment and upon learning that the draft has not been paid or accepted in due course must seasonably notify its customer o such fact even though it may have discounted or bought the draft o extended credit available for withdrawal as of right.

History: En. Sec. 4-501, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-501.

30-4-502. Presentment of “on arrival” drafts. When a draft or th relevant instructions require presentment “on arrival”, “when goods arrive or the like, the collecting bank need not present until in its judgment reasonable time for arrival of the goods has expired. Refusal to pay or accep because the goods have not arrived is not dishonor; the bank must notify it transferor of such refusal but need not present the draft again until it i instructed to do so or learns of the arrival of the goods.

History: En. Sec. 4-502, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-502.

30-4-503. Responsibility of presenting bank for documents an goods — report of reasons for dishonor — referee in case of need Unless otherwise instructed and except as provided in Chapter 5 a bank presenting a documentary draft:

(a) must deliver the documents to the drawee on acceptance of the draf if it is payable more than 3 days after presentment; otherwise, only on payment; and

(b) upon dishonor, either in the case of presentment for acceptance o presentment for payment, may seek and follow instructions from any refere in case of need designated in the draft or if the presenting bank does no choose to utilize his services it must use diligence and good faith to ascertai the reason for dishonor, must notify its transferor of the dishonor and of th results of its effort to ascertain the reasons therefor and must reques instructions.

But the presenting bank is under no obligation with respect to goods represented by the documents except to follow any reasonable instructions seasonably received; it has a right to reimbursement for any expense incurred in following instructions and to prepayment of or indemnity fo such expenses.

History: En. Sec. 4-503, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-503.

30-4-504. Privilege of presenting bank to deal with goods — security interest for expenses. (1) A presenting bank which, following the dishonor of a documentary draft, has seasonably requested instructions but does not receive them within a reasonable time may store, sell, or otherwise deal with the goods in any reasonable manner.

(2) For its reasonable expenses incurred by action under subsection (1) the presenting bank has a lien upon the goods or their proceeds, which may be foreclosed in the same manner as an unpaid seller's lien.

History: En. Sec. 4-504, Ch. 264, L. 1963; R.C.M. 1947, 87A-4-504.

CHAPTER 5

UNIFORM COMMERCIAL CODE
LETTERS OF CREDIT

Part 1 — Letters of Credit

Section

30-5-101. Short title.
30-5-102. Scope.

5-103. Definitions.
5-104. Formal requirement — signing.
5-105. Consideration.
5-106. Time and effect of establishment of credit.
5-107. Advice of credit — confirmation — error in statement of terms.
5-108. "Notation credit" — exhaustion of credit.
5-109. Issuer's obligation to its customer.
5-110. Availability of credit in portions — presenter's reservation of lien or claim.
5-111. Warranties on transfer and presentment.
5-112. Time allowed for honor or rejection — withholding honor or rejection by consent — "presenter".
5-113. Indemnities.
5-114. Issuer's duty and privilege to honor — right to reimbursement.
5-115. Remedy for improper dishonor or anticipatory repudiation.
5-116. Transfer and assignment.
5-117. Insolvency of bank holding funds for documentary credit.

Part 1

Letters of Credit

30-5-101. Short title. This chapter shall be known and may be cited Uniform Commercial Code—Letters of Credit.

istory: En. Sec. 5-101, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-101.

30-5-102. Scope. (1) This chapter applies:

(a) to a credit issued by a bank if the credit requires a documentary draft a documentary demand for payment; and

(b) to a credit issued by a person other than a bank if the credit requires at the draft or demand for payment be accompanied by a document of le; and

(c) to a credit issued by a bank or other person if the credit is not within oparagraphs (a) or (b) but conspicuously states that it is a letter of credit is conspicuously so entitled.

(2) Unless the engagement meets the requirements of subsection (1), this apter does not apply to engagements to make advances or to honor drafts demands for payment, to authorities to pay or purchase, to guarantees or general agreements.

(3) This chapter deals with some but not all of the rules and concepts of ters of credit as such rules or concepts have developed prior to this code may hereafter develop. The fact that this chapter states a rule does not itself require, imply or negate application of the same or a converse rule a situation not provided for or to a person not specified by this chapter.

istory: En. Sec. 5-102, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-102.

30-5-103. Definitions. (1) In this chapter unless the context otherwise uires:

a) "Credit" or "letter of credit" means an engagement by a bank or er person made at the request of a customer and of a kind within the pe of this chapter (30-5-102) that the issuer will honor drafts or other nands for payment upon compliance with the conditions specified in the credit. A credit may be either revocable or irrevocable. The engagement ma be either an agreement to honor or a statement that the bank or othe person is authorized to honor.

(b) A "documentary draft" or a "documentary demand for payment" i one honor of which is conditioned upon the presentation of a document o documents. "Document" means any paper including document of title, security, invoice, certificate, notice of default and the like.

(c) An "issuer" is a bank or other person issuing a credit.

(d) A "beneficiary" of a credit is a person who is entitled under its term to draw or demand payment.

(e) An "advising bank" is a bank which gives notification of the issuanc of a credit by another bank.

(f) A "confirming bank" is a bank which engages either that it will itsel honor a credit already issued by another bank or that such a credit will b honored by the issuer or a third bank.

(g) A "customer" is a buyer or other person who causes an issuer to issu a credit. The term also includes a bank which procures issuance or confirmation on behalf of that bank's customer.

(2) Other definitions applying to this chapter and the sections in whic they appear are:

"Notation of credit". 30-5-108.
"Presenter". 30-5-112(3).

(3) Definitions in other chapters applying to this chapter and the section in which they appear are:

"Accept" or "acceptance". 30-3-410.
"Contract for sale". 30-2-106.
"Draft". 30-3-104.
"Holder in due course". 30-3-302.
"Midnight deadline". 30-4-104.
"Security". 30-8-102.

(4) In addition, Chapter 1 contains general definitions and principles o construction and interpretation applicable throughout this chapter.

History: **En. Sec. 5-103, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-103.**

30-5-104. Formal requirement — signing. (1) Except as otherwis required in subsection (1)(c) of 30-5-102 on scope, no particular form o phrasing is required for a credit. A credit must be in writing and signed b the issuer and a confirmation must be in writing and signed by the confirming bank. A modification of the terms of a credit or confirmation must b signed by the issuer or confirming bank.

(2) A telegram may be a sufficient signed writing if it identifies its sende by an authorized authentication. The authentication may be in code and th authorized naming of the issuer in an advice of credit is a sufficient signing.

History: **En. Sec. 5-104, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-104.**

30-5-105. Consideration. No consideration is necessary to establish credit or to enlarge or otherwise modify its terms.

History: **En. Sec. 5-105, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-105.**

30-5-106. Time and effect of establishment of credit. (1) Unles otherwise agreed a credit is established:

(a) as regards the customer as soon as a letter of credit is sent to him or e letter of credit or an authorized written advice of its issuance is sent to e beneficiary; and

(b) as regards the beneficiary when he receives a letter of credit or an thorized written advice of its issuance.

(2) Unless otherwise agreed once an irrevocable credit is established as gards the customer it can be modified or revoked only with the consent of e customer and once it is established as regards the beneficiary it can be odified or revoked only with his consent.

(3) Unless otherwise agreed after a revocable credit is established it may modified or revoked by the issuer without notice to or consent from the stomer or beneficiary.

(4) Notwithstanding any modification or revocation of a revocable credit y person authorized to honor or negotiate under the terms of the original edit is entitled to reimbursement for or honor of any draft or demand for yment duly honored or negotiated before receipt of notice of the modifi- tion or revocation and the issuer in turn is entitled to reimbursement from customer.

History: **En. Sec. 5-106, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-106.**

30-5-107. Advice of credit — confirmation — error in statement terms. (1) Unless otherwise specified an advising bank by advising a edit issued by another bank does not assume any obligation to honor drafts awn or demands for payment made under the credit but it does assume ligation for the accuracy of its own statement.

(2) A confirming bank by confirming a credit becomes directly obligated the credit to the extent of its confirmation as though it were its issuer d acquires the rights of an issuer.

(3) Even though an advising bank incorrectly advises the terms of a edit it has been authorized to advise the credit is established as against the uer to the extent of its original terms.

(4) Unless otherwise specified the customer bears as against the issuer all ks of transmission and reasonable translation or interpretation of any mes- ge relating to a credit.

History: **En. Sec. 5-107, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-107.**

30-5-108. "Notation credit" — exhaustion of credit. (1) A credit ich specifies that any person purchasing or paying drafts drawn or mands for payment made under it must note the amount of the draft or mand on the letter or advice of credit is a "notation credit".

(2) Under a notation credit:

(a) a person paying the beneficiary or purchasing a draft or demand for yment from him acquires a right to honor only if the appropriate notation made and by transferring or forwarding for honor the documents under the edit such a person warrants to the issuer that the notation has been made; d

(b) unless the credit or a signed statement that an appropriate notation s been made accompanies the draft or demand for payment the issuer may delay honor until evidence of notation has been procured which is satisfactory to it but its obligation and that of its customer continue for a reasonable time not exceeding 30 days to obtain such evidence.

(3) If the credit is not a notation credit:

(a) the issuer may honor complying drafts or demands for payment presented to it in the order in which they are presented and is discharged pro tanto by honor of any such draft or demand;

(b) as between competing good faith purchasers of complying drafts or demands the person first purchasing has priority over a subsequent purchaser even though the later purchased draft or demand has been first honored.

History: En. Sec. 5-108, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-108.

30-5-109. Issuer's obligation to its customer. (1) An issuer's obligation to its customer includes good faith and observance of any general banking usage but unless otherwise agreed does not include liability or responsibility:

(a) for performance of the underlying contract for sale or other transaction between the customer and the beneficiary; or

(b) for any act or omission of any person other than itself or its own branch or for loss or destruction of a draft, demand or document in transit or in the possession of others; or

(c) based on knowledge or lack of knowledge of any usage of any particular trade.

(2) An issuer must examine documents with care so as to ascertain that on their face they appear to comply with the terms of the credit but unless otherwise agreed assumes no liability or responsibility for the genuineness, falsification or effect of any document which appears on such examination to be regular on its face.

(3) A nonbank issuer is not bound by any banking usage of which it has no knowledge.

History: En. Sec. 5-109, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-109.

30-5-110. Availability of credit in portions — presenter's reservation of lien or claim. (1) Unless otherwise specified a credit may be used in portions in the discretion of the beneficiary.

(2) Unless otherwise specified a person by presenting a documentary draft or demand for payment under a credit relinquishes upon its honor all claims to the documents and a person by transferring such draft or demand or causing such presentment authorizes such relinquishment. An explicit reservation of claim makes the draft or demand noncomplying.

History: En. Sec. 5-110, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-110.

30-5-111. Warranties on transfer and presentment. (1) Unless otherwise agreed the beneficiary by transferring or presenting a documentary draft or demand for payment warrants to all interested parties that the necessary conditions of the credit have been complied with. This is in addition to any warranties arising under Chapters 3, 4, 7 and 8.

(2) Unless otherwise agreed a negotiating, advising, confirming, collecting or issuing bank presenting or transferring a draft or demand for payment

ıder a credit warrants only the matters warranted by a collecting bank
ıder Chapter 4 and any such bank transferring a document warrants only
e matters warranted by an intermediary under Chapters 7 and 8.

History: En. Sec. 5-111, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-111.

**30-5-112. Time allowed for honor or rejection — withholding
ɔnor or rejection by consent — "presenter".** (1) A bank to which a
ıcumentary draft or demand for payment is presented under a credit may
thout dishonor of the draft, demand or credit:

(a) defer honor until the close of the third banking day following receipt
the documents; and

(b) further defer honor if the presenter has expressly or impliedly con-
nted thereto. Failure to honor within the time here specified constitutes
shonor of the draft or demand and of the credit.

(2) Upon dishonor the bank may unless otherwise instructed fulfill its
ıty to return the draft or demand and the documents by holding them at
e disposal of the presenter and sending him an advice to that effect.

(3) "Presenter" means any person presenting a draft or demand for pay-
ent for honor under a credit even though that person is a confirming bank
other correspondent which is acting under an issuer's authorization.

History: En. Sec. 5-112, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-112.

30-5-113. Indemnities. (1) A bank seeking to obtain (whether for itself
another) honor, negotiation or reimbursement under a credit may give an
demnity to induce such honor, negotiation or reimbursement.

(2) An indemnity agreement inducing honor, negotiation or reimburse-
ent:

(a) unless otherwise explicitly agreed applies to defects in the documents
t not in the goods; and

(b) unless a longer time is explicitly agreed expires at the end of 10 busi-
ss days following receipt of the documents by the ultimate customer unless
tice of objection is sent before such expiration date. The ultimate customer
ıy send notice of objection to the person from whom he received the docu-
ents and any bank receiving such notice is under a duty to send notice to
transferor before its midnight deadline.

History: En. Sec. 5-113, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-113.

**30-5-114. Issuer's duty and privilege to honor — right to reim-
ırsement.** (1) An issuer must honor a draft or demand for payment which
mplies with the terms of the relevant credit regardless of whether the
ɔds or documents conform to the underlying contract for sale or other con-
ıct between the customer and the beneficiary. The issuer is not excused
m honor of such a draft or demand by reason of an additional general
m that all documents must be satisfactory to the issuer, but an issuer may
quire that specified documents must be satisfactory to it.

(2) Unless otherwise agreed when documents appear on their face to com-
with the terms of a credit but a required document does not in fact con-
m to the warranties made on negotiation or transfer of a document of title
)-7-507) or of a security (30-8-306) or is forged or fraudulent or there is
ud in the transaction:

(a) the issuer must honor the draft or demand for payment if honor is demanded by a negotiating bank or other holder of the draft or demand which has taken the draft or demand under the credit and under circumstances which would make it a holder in due course (30-3-302) and in an appropriate case would make it a person to whom a document of title has been duly negotiated (30-7-502) or a bona fide purchaser of a security (30-8-302); and

(b) in all other cases as against its customer, an issuer acting in good faith may honor the draft or demand for payment despite notification from the customer of fraud, forgery or other defect not apparent on the face o the documents but a court of appropriate jurisdiction may enjoin such honor.

(3) Unless otherwise agreed an issuer which has duly honored a draft o demand for payment is entitled to immediate reimbursement of any payment made under the credit and to be put in effectively available funds not later than the day before maturity of any acceptance made under the credit.

History: En. Sec. 5-114, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-114.

30-5-115. Remedy for improper dishonor or anticipatory repudiation. (1) When an issuer wrongfully dishonors a draft or demand for payment presented under a credit the person entitled to honor has with respect to any documents the rights of a person in the position of a seller (30-2-707 and may recover from the issuer the face amount of the draft or demand together with incidental damages under 30-2-710 on seller's incidental damages and interest but less any amount realized by resale or other use or disposition of the subject matter of the transaction. In the event no resale o other utilization is made the documents, goods or other subject matter involved in the transaction must be turned over to the issuer on payment o judgment.

(2) When an issuer wrongfully cancels or otherwise repudiates a credit before presentment of a draft or demand for payment drawn under it the beneficiary has the rights of a seller after anticipatory repudiation by the buyer under 30-2-610 if he learns of the repudiation in time reasonably to avoid procurement of the required documents. Otherwise the beneficiary has an immediate right of action for wrongful dishonor.

History: En. Sec. 5-115, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-115.

30-5-116. Transfer and assignment. (1) The right to draw under a credit can be transferred or assigned only when the credit is expressly designated as transferable or assignable.

(2) Even though the credit specifically states that it is nontransferable o nonassignable the beneficiary may before performance of the conditions o the credit assign his right to proceeds. Such an assignment is an assignment of a contract right under Chapter 9 on Secured Transactions and is governed by that chapter except that:

(a) the assignment is ineffective until the letter of credit or advice o credit is delivered to the assignee which delivery constitutes perfection of the security interest under Chapter 9; and

(b) the issuer may honor drafts or demands for payment drawn under the credit until it receives a notification of the assignment signed by the beneficiary which reasonably identifies the credit involved in the assignment and contains a request to pay the assignee; and

(c) after what reasonably appears to be such a notification has been ceived the issuer may without dishonor refuse to accept or pay even to a rson otherwise entitled to honor until the letter of credit or advice of edit is exhibited to the issuer.

(3) Except where the beneficiary has effectively assigned his right to draw his right to proceeds, nothing in this section limits his right to transfer negotiate drafts or demands drawn under the credit.

History: En. Sec. 5-116, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-116.

30-5-117. Insolvency of bank holding funds for documentary edit. (1) Where an issuer or an advising or confirming bank or a bank ich has for a customer procured issuance of a credit by another bank comes insolvent before final payment under the credit and the credit is one which this chapter is made applicable by paragraphs (a) or (b) of -5-102(1) on scope, the receipt or allocation of funds or collateral to secure meet obligations under the credit shall have the following results:

(a) to the extent of any funds or collateral turned over after or before the solvency as indemnity against or specifically for the purpose of payment of afts or demands for payment drawn under the designated credit, the drafts demands are entitled to payment in preference over depositors or other neral creditors of the issuer or bank; and

(b) on expiration of the credit or surrender of the beneficiary's rights der it unused any person who has given such funds or collateral is simi- rly entitled to return thereof; and

(c) a charge to a general or current account with a bank if specifically nsented to for the purpose of indemnity against or payment of drafts or mands for payment drawn under the designated credit falls under the me rules as if the funds had been drawn out in cash and then turned over th specific instructions.

(2) After honor or reimbursement under this section the customer or her person for whose account the insolvent bank has acted is entitled to ceive the documents involved.

History: En. Sec. 5-117, Ch. 264, L. 1963; R.C.M. 1947, 87A-5-117.

CHAPTER 6

UNIFORM COMMERCIAL CODE
BULK TRANSFERS

Part 1 — Bulk Transfers

ction
6-101. Short title.
6-102. "Bulk transfer" — transfers of equipment — enterprises subject to this chapter — bulk transfers subject to this chapter.
6-103. Transfers excepted from this chapter.
6-104. Schedule of property, list of creditors.
6-105. Notice to creditors.
6-106. Application of the proceeds.
6-107. The notice.
6-108. Auction sales — "auctioneer".

30-6-109. What creditors protected — credit for payment to particular creditors.
30-6-110. Subsequent transfers.
30-6-111. Limitation of actions and levies.

Part 1

Bulk Transfers

30-6-101. Short title. This chapter shall be known and may be cited as Uniform Commercial Code—Bulk Transfers.

History: En. Sec. 6-101, Ch. 264, L. 1963; R.C.M. 1947, 87A-6-101.

30-6-102. "Bulk transfer" — transfers of equipment — enterprises subject to this chapter — bulk transfers subject to this chapter. (1) A "bulk transfer" is any transfer in bulk and not in the ordinary course of the transferor's business of a major part of the materials, supplies, merchandise or other inventory (30-9-109) of an enterprise subject to this chapter.

(2) A transfer of a substantial part of the equipment (30-9-109) of such an enterprise is a bulk transfer if it is made in connection with a bulk transfer of inventory, but not otherwise.

(3) The enterprises subject to this chapter are all those whose principa business is the sale of merchandise from stock, including those who manufacture what they sell.

(4) Except as limited by the following section all bulk transfers of goods located within this state are subject to this chapter.

History: En. Sec. 6-102, Ch. 264, L. 1963; R.C.M. 1947, 87A-6-102.

30-6-103. Transfers excepted from this chapter. The following transfers are not subject to this chapter:

(1) Those made to give security for the performance of an obligation;

(2) General assignments for the benefit of all the creditors of the transferor, and subsequent transfers by the assignee thereunder;

(3) Transfers in settlement or realization of a lien or other security interests;

(4) Sales by executors, administrators, receivers, trustees in bankruptcy or any public officer under judicial process;

(5) Sales made in the course of judicial or administrative proceedings for the dissolution or reorganization of a corporation and of which notice is sent to the creditors of the corporation pursuant to order of the court or administrative agency;

(6) Transfers to a person maintaining a known place of business in this state who becomes bound to pay the debts of the transferor in full and gives public notice of that fact, and who is solvent after becoming so bound;

(7) A transfer to a new business enterprise organized to take over and continue the business, if public notice of the transaction is given and the new enterprise assumes the debts of the transferor and he receives nothing from the transaction except an interest in the new enterprise junior to the claims of creditors;

(8) Transfers of property which is exempt from execution.

Public notice under subsection (6) or subsection (7) may be given by pub- ishing once a week for 2 consecutive weeks in a newspaper of general circula- on where the transferor had its principal place of business in this state an lvertisement including the names and addresses of the transferor and trans- ree and the effective date of the transfer.

History: En. Sec. 6-103, Ch. 264, L. 1963; R.C.M. 1947, 87A-6-103.

30-6-104. Schedule of property, list of creditors. (1) Except as ovided with respect to auction sales (30-6-108), a bulk transfer subject to is chapter is ineffective against any creditor of the transferor unless:

(a) the transferee requires the transferor to furnish a list of his existing editors prepared as stated in this section; and

(b) the parties prepare a schedule of the property transferred sufficient identify it; and

(c) the transferee preserves the list and schedule for 6 months next fol- wing the transfer and permits inspection of either or both and copying erefrom at all reasonable hours by any creditor of the transferor, or files e list and schedule in the office of the county clerk and recorder of the unty of residence of the transferor, and also in the office of the county erk and recorder of the county in which the property transferred is located the time of transfer.

(2) The list of creditors must be signed and sworn to or affirmed by the ansferor or his agent. It must contain the names and business addresses of l creditors of the transferor, with the amounts when known, and also the ames of all persons who are known to the transferor to assert claims against m even though such claims are disputed. If the transferor is the obligor of outstanding issue of bonds, debentures or the like as to which there is an denture trustee, the list of creditors need include only the name and ldress of the indenture trustee and the aggregate outstanding principal nount of the issue.

(3) Responsibility for the completeness and accuracy of the list of credi- rs rests on the transferor, and the transfer is not rendered ineffective by rors or omissions therein unless the transferee is shown to have had knowl- lge.

History: En. Sec. 6-104, Ch. 264, L. 1963; R.C.M. 1947, 87A-6-104.

30-6-105. Notice to creditors. In addition to the requirements of the receding section, any bulk transfer subject to this chapter except one made auction sale (30-6-108) is ineffective against any creditor of the transferor nless at least 10 days before he takes possession of the goods or pays for em, whichever happens first, the transferee gives notice of the transfer in e manner and to the persons hereafter provided (30-6-107).

History: En. Sec. 6-105, Ch. 264, L. 1963; R.C.M. 1947, 87A-6-105.

30-6-106. Application of the proceeds. In addition to the require- ents of the two preceding sections:

(1) Upon every bulk transfer subject to this chapter for which new con- deration becomes payable except those made by sale at auction it is the

duty of the transferee to assure that such consideration is applied so far as necessary to pay those debts of the transferor which are either shown on the list furnished by the transferor (30-6-104) or filed in writing in the place stated in the notice (30-6-107) within 30 days after the mailing of such notice. This duty of the transferee runs to all the holders of such debts, and may be enforced by any of them for the benefit of all.

(2) If any of said debts are in dispute the necessary sum may be withheld from distribution until the dispute is settled or adjudicated.

(3) If the consideration payable is not enough to pay all of the said debts in full distribution shall be made pro rata.

(4) The transferee may within 10 days after he takes possession of the goods pay the consideration into the district court in the county where the transferor had its principal place of business in this state and thereafter may discharge his duty under this section by giving notice by registered or certified mail to all the persons to whom the duty runs that the consideration has been paid into that court and that they should file their claims there. On motion of any interested party, the court may order the distribution of the consideration to the persons entitled to it.

History: En. Sec. 6-106, Ch. 264, L. 1963; R.C.M. 1947, 87A-6-106.

30-6-107. The notice. (1) The notice to creditors (30-6-105) shall state:

(a) that a bulk transfer is about to be made; and

(b) the names and business addresses of the transferor and transferee, and all other business names and addresses used by the transferor within 3 years last past so far as known to the transferee; and

(c) whether or not all the debts of the transferor are to be paid in full as they fall due as a result of the transaction, and if so, the address to which creditors should send their bills.

(2) If the debts of the transferor are not to be paid in full as they fall due or if the transferee is in doubt on that point then the notice shall state further:

(a) the location and general description of the property to be transferred and the estimated total of the transferor's debts;

(b) the address where the schedule of property and list of creditors (30-6-104) may be inspected;

(c) whether the transfer is to pay existing debts and if so the amount of such debts and to whom owing;

(d) whether the transfer is for new consideration and if so the amount of such consideration and the time and place of payment; and

(e) if for new consideration the time and place where creditors of the transferor are to file their claims.

(3) The notice in any case shall be delivered personally or sent by registered or certified mail to all the persons shown on the list of creditors furnished by the transferor (30-6-104) and to all other persons who are known to the transferee to hold or assert claims against the transferor.

History: En. Sec. 6-107, Ch. 264, L. 1963; R.C.M. 1947, 87A-6-107.

30-6-108. Auction sales — "auctioneer". (1) A bulk transfer is subject to this chapter even though it is by sale at auction, but only in the manner and with the results stated in this section.

(2) The transferor shall furnish a list of his creditors and assist in the eparation of a schedule of the property to be sold, both prepared as before ated (30-6-104).

(3) The person or persons other than the transferor who direct, control are responsible for the auction are collectively called the "auctioneer". The ctioneer shall:

(a) receive and retain the list of creditors and prepare and retain the hedule of property for the period stated in this chapter (30-6-104);

(b) give notice of the auction personally or by registered or certified mail least 10 days before it occurs to all persons shown on the list of creditors d to all other persons who are known to him to hold or assert claims ainst the transferor; and

(c) assure that the net proceeds of the auction are applied as provided in is chapter (30-6-106).

(4) Failure of the auctioneer to perform any of these duties does not fect the validity of the sale or the title of the purchasers, but if the auc-oneer knows that the auction constitutes a bulk transfer such failure nders the auctioneer liable to the creditors of the transferor as a class for e sums owing to them from the transferor up to but not exceeding the net oceeds of the auction. If the auctioneer consists of several persons their lia-lity is joint and several.

History: **En. Sec. 6-108, Ch. 264, L. 1963; R.C.M. 1947, 87A-6-108.**

30-6-109. What creditors protected — credit for payment to articular creditors. (1) The creditors of the transferor mentioned in this apter are those holding claims based on transactions or events occurring efore the bulk transfer, but creditors who become such after notice to credi-rs is given (30-6-105 and 30-6-107) are not entitled to notice.

(2) Against the aggregate obligation imposed by the provisions of this apter concerning the application of the proceeds (30-6-106 and subsection)(c) of 30-6-108) the transferee or auctioneer is entitled to credit for sums id to particular creditors of the transferor, not exceeding the sums believed good faith at the time of the payment to be properly payable to such cred-ors.

History: **En. Sec. 6-109, Ch. 264, L. 1963; R.C.M. 1947, 87A-6-109.**

30-6-110. Subsequent transfers. When the title of a transferee to roperty is subject to a defect by reason of his noncompliance with the quirements of this chapter, then:

(1) a purchaser of any of such property from such transferee who pays no lue or who takes with notice of such noncompliance takes subject to such efect, but

(2) a purchaser for value in good faith and without such notice takes free such defect.

History: **En. Sec. 6-110, Ch. 264, L. 1963; R.C.M. 1947, 87A-6-110.**

30-6-111. Limitation of actions and levies. No action under this apter shall be brought nor levy made more than 6 months after the date which the transferee took possession of the goods unless the transfer has been concealed. If the transfer has been concealed, actions may be brough or levies made within 6 months after its discovery.

History: **En. Sec. 6-111, Ch. 264, L. 1963; R.C.M. 1947, 87A-6-111.**

CHAPTER 7

UNIFORM COMMERCIAL CODE WAREHOUSE RECEIPTS, BILLS OF LADING, AND OTHER DOCUMENTS OF TITLE

Part 1 — General

Section
30-7-101. Short title.
30-7-102. Definitions and index of definitions.
30-7-103. Relation of chapter to treaty, statute, tariff, classification or regulation.
30-7-104. Negotiable and nonnegotiable warehouse receipt, bill of lading or other document of title.
30-7-105. Construction against negative implication.

Part 2 — Warehouse Receipts—Special Provisions

30-7-201. Who may issue a warehouse receipt — storage under government bond.
30-7-202. Form of warehouse receipt — essential terms — optional terms.
30-7-203. Liability for nonreceipt or misdescription.
30-7-204. Duty of care — contractual limitation of warehouseman's liability.
30-7-205. Title under warehouse receipt defeated in certain cases.
30-7-206. Termination of storage at warehouseman's option.
30-7-207. Goods must be kept separate — fungible goods.
30-7-208. Altered warehouse receipts.
30-7-209. Lien of warehouseman.
30-7-210. Enforcement of warehouseman's lien.

Part 3 — Bills of Lading—Special Provisions

30-7-301. Liability for nonreceipt or misdescription — "said to contain" — "shipper's load and count" — improper handling.
30-7-302. Through bills of lading and similar documents.
30-7-303. Diversion — reconsignment — change of instructions.
30-7-304. Bills of lading in a set.
30-7-305. Destination bills.
30-7-306. Altered bills of lading.
30-7-307. Lien of carrier.
30-7-308. Enforcement of carrier's lien.
30-7-309. Duty of care — contractual limitation of carrier's liability.

Part 4 — Warehouse Receipts and Bills of Lading General Obligations

30-7-401. Irregularities in issue of receipt or bill or conduct of issuer.
30-7-402. Duplicate receipt or bill — overissue.
30-7-403. Obligation of warehouseman or carrier to deliver — excuse.
30-7-404. No liability for good faith delivery pursuant to receipt or bill.

Part 5 — Warehouse Receipts and Bills of Lading Negotiation and Transfer

30-7-501. Form of negotiation and requirements of "due negotiation".
30-7-502. Rights acquired by due negotiation.
30-7-503. Document of title to goods defeated in certain cases.

7-504. Rights acquired in the absence of due negotiation — effect of diversion — seller's stoppage of delivery.
7-505. Endorser not a guarantor for other parties.
7-506. Delivery without endorsement — right to compel endorsement.
7-507. Warranties on negotiation or transfer of receipt or bill.
7-508. Warranties of collecting bank as to documents.
7-509. Receipt or bill — when adequate compliance with commercial contract.

Part 6 — Warehouse Receipts and Bills of Lading Miscellaneous Provisions

7-601. Lost and missing documents.
7-602. Attachment of goods covered by a negotiable document.
7-603. Conflicting claims — interpleader.

Part 7 — Penalties

7-701. Penalty for issuing receipt when goods have not been delivered.
7-702. Penalty for fraudulently issuing receipt.
7-703. Penalty for issuing duplicate negotiable receipt when original is outstanding without marking the same "duplicate".
7-704. Penalty for issuing negotiable receipt for goods which warehouseman owns.
7-705. Penalty for delivering goods without obtaining possession of outstanding negotiable receipt.
7-706. Penalty for negotiating receipt for goods with defective title.

Part 1

General

30-7-101. Short title. This chapter shall be known and may be cited Uniform Commercial Code—Documents of Title.

History: En. Sec. 7-101, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-101.

30-7-102. Definitions and index of definitions. (1) In this chapter, less the context otherwise requires:

a) "Bailee" means the person who by a warehouse receipt, bill of lading other document of title acknowledges possession of goods and contracts to iver them.

b) "Consignee" means the person named in a bill to whom or to whose ler the bill promises delivery.

c) "Consignor" means the person named in a bill as the person from om the goods have been received for shipment.

d) "Delivery order" means a written order to deliver goods directed to varehouseman, carrier or other person who in the ordinary course of busiss issues warehouse receipts or bills of lading.

e) "Document" means document of title as defined in 30-1-201(15).

f) "Goods" means all things which are treated as movable for the purses of a contract of storage or transportation.

g) "Issuer" means a bailee who issues a document except that in relation an unaccepted delivery order it means the person who orders the possessor goods to deliver. Issuer includes any person for whom an agent or employee purports to act in issuing a document if the agent or employee ha real or apparent authority to issue documents, notwithstanding that th issuer received no goods or that the goods were misdescribed or that in an other respect the agent or employee violated his instructions.

(h) "Warehouseman" is a person engaged in the business of storing good for hire.

(2) Other definitions applying to this chapter or to specified part thereof, and the sections in which they appear are:

"Duly negotiate". 30-7-501.

"Person entitled under the document". 30-7-403(4).

(3) Definitions in other chapters applying to this chapter and the section in which they appear are:

"Contract for sale". 30-2-106.

"Overseas". 30-2-323.

"Receipt" of goods. 30-2-103.

(4) In addition Chapter 1 contains general definitions and principles o construction and interpretation applicable throughout this chapter.

History: En. Sec. 7-102, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-102; amd. Sec. 1, Ch. 137, I 1979.

30-7-103. Relation of chapter to treaty, statute, tariff, classifi cation or regulation. To the extent that any treaty or statute of th United States, regulatory statute of this state or tariff, classification or regu lation filed or issued pursuant thereto is applicable, the provisions of thi chapter are subject thereto.

History: En. Sec. 7-103, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-103.

30-7-104. Negotiable and nonnegotiable warehouse receipt, bil of lading or other document of title. (1) A warehouse receipt, bill of lad ing or other document of title is negotiable:

(a) if by its terms the goods are to be delivered to bearer or to the orde of a named person; or

(b) where recognized in overseas trade, if it runs to a named person o assigns.

(2) Any other document is nonnegotiable. A bill of lading in which it i stated that the goods are consigned to a named person is not made nego tiable by a provision that the goods are to be delivered only against a writte order signed by the same or another named person.

History: En. Sec. 7-104, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-104.

30-7-105. Construction against negative implication. The omis sion from either Part 2 or Part 3 of this chapter of a provision correspondin to a provision made in the other part does not imply that a correspondin rule of law is not applicable.

History: En. Sec. 7-105, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-105.

Part 2

Warehouse Receipts — Special Provisions

30-7-201. Who may issue a warehouse receipt — storage under government bond. (1) A warehouse receipt may be issued by any warehouseman.

(2) Where goods including distilled spirits and agricultural commodities e stored under a statute requiring a bond against withdrawal or a license r the issuance of receipts in the nature of warehouse receipts, a receipt sued for the goods has like effect as a warehouse receipt even though issued a person who is the owner of the goods and is not a warehouseman.

History: **En. Sec. 7-201, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-201.**

30-7-202. Form of warehouse receipt — essential terms — ptional terms. (1) A warehouse receipt need not be in any particular rm.

(2) Unless a warehouse receipt embodies within its written or printed rms each of the following, the warehouseman is liable for damages caused the omission to a person injured thereby:

(a) the location of the warehouse where the goods are stored;

(b) the date of issue of the receipt;

(c) the consecutive number of the receipt;

(d) a statement whether the goods received will be delivered to the earer, to a specified person, or to a specified person or his order;

(e) the rate of storage and handling charges, except that where goods are ored under a field warehousing arrangement a statement of that fact is sufcient on a nonnegotiable receipt;

(f) a description of the goods or of the packages containing them;

(g) the signature of the warehouseman, which may be made by his uthorized agent;

(h) if the receipt is issued for goods of which the warehouseman is owner, ther solely or jointly or in common with others, the fact of such ownership; nd

(i) a statement of the amount of advances made and of liabilities incurred r which the warehouseman claims a lien or security interest (30-7-209). If e precise amount of such advances made or of such liabilities incurred is, the time of the issue of the receipt, unknown to the warehouseman or to is agent who issues it, a statement of the fact that advances have been ade or liabilities incurred and the purpose thereof is sufficient.

(3) A warehouseman may insert in his receipt any other terms which are ot contrary to the provisions of this code and do not impair his obligation delivery (30-7-403) or his duty of care (30-7-204). Any contrary provisions hall be ineffective.

History: **En. Sec. 7-202, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-202.**

30-7-203. Liability for nonreceipt or misdescription. A party to purchaser for value in good faith of a document of title other than a bill lading relying in either case upon the description therein of the goods may ecover from the issuer damages caused by the nonreceipt or misdescription the goods, except to the extent that the document conspicuously indicates hat the issuer does not know whether any part or all of the goods in fact ere received or conform to the description, as where the description is in rms of marks or labels or kind, quantity or condition, or the receipt or escription is qualified by "contents, condition and quality unknown", "said to contain" or the like, if such indication be true, or the party or purchaser otherwise has notice.

History: **En. Sec. 7-203, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-203.**

30-7-204. Duty of care — contractual limitation of warehouseman's liability. (1) A warehouseman is liable for damages for loss of or injury to the goods caused by his failure to exercise such care in regard to them as a reasonably careful man would exercise under like circumstances but unless otherwise agreed he is not liable for damages which could not have been avoided by the exercise of such care.

(2) Damages may be limited by a term in the warehouse receipt or storage agreement limiting the amount of liability in case of loss or damage, and setting forth a specific liability per article or item, or value per unit of weight, beyond which the warehouseman shall not be liable; provided, however, that such liability may on written request of the bailor at the time of signing such storage agreement or within a reasonable time after receipt of the warehouse receipt be increased on part or all of the goods thereunder, in which event increased rates may be charged based on such increased valuation, but that no such increase shall be permitted contrary to a lawful limitation of liability contained in the warehouseman's tariff, if any. No such limitation is effective with respect to the warehouseman's liability for conversion to his own use.

(3) Reasonable provisions as to the time and manner of presenting claims and instituting actions based on the bailment may be included in the warehouse receipt or tariff.

History: **En. Sec. 7-204, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-204.**

30-7-205. Title under warehouse receipt defeated in certain cases. A buyer in the ordinary course of business of fungible goods sold and delivered by a warehouseman who is also in the business of buying and selling such goods takes free of any claim under a warehouse receipt even though it has been duly negotiated.

History: **En. Sec. 7-205, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-205.**

30-7-206. Termination of storage at warehouseman's option. (1) A warehouseman may on notifying the person on whose account the goods are held and any other person known to claim an interest in the goods require payment of any charges and removal of the goods from the warehouse at the termination of the period of storage fixed by the document, or, if no period is fixed, within a stated period not less than 30 days after the notification. If the goods are not removed before the date specified in the notification, the warehouseman may sell them in accordance with the provisions of the section on enforcement of a warehouseman's lien (30-7-210).

(2) If a warehouseman in good faith believes that the goods are about to deteriorate or decline in value to less than the amount of his lien within the time prescribed in subsection (1) for notification, advertisement and sale, the warehouseman may specify in the notification any reasonable shorter time for removal of the goods and in case the goods are not removed, may sell them at public sale held not less than 1 week after a single advertisement or posting.

(3) If as a result of a quality or condition of the goods of which the ware- useman had no notice at the time of deposit the goods are a hazard to ner property or to the warehouse or to persons, the warehouseman may sell e goods at public or private sale without advertisement on reasonable noti- ation to all persons known to claim an interest in the goods. If the ware- useman after a reasonable effort is unable to sell the goods he may dispose them in any lawful manner and shall incur no liability by reason of such sposition.

(4) The warehouseman must deliver the goods to any person entitled to em under this chapter upon due demand made at any time prior to sale other disposition under this section.

(5) The warehouseman may satisfy his lien from the proceeds of any sale disposition under this section but must hold the balance for delivery on e demand of any person to whom he would have been bound to deliver the ods.

istory: En. Sec. 7-206, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-206.

30-7-207. Goods must be kept separate — fungible goods. (1) nless the warehouse receipt otherwise provides, a warehouseman must keep parate the goods covered by each receipt so as to permit at all times iden- ication and delivery of those goods except that different lots of fungible ods may be commingled.

(2) Fungible goods so commingled are owned in common by the persons titled thereto and the warehouseman is severally liable to each owner for at owner's share. Where because of overissue a mass of fungible goods is sufficient to meet all the receipts which the warehouseman has issued ainst it, the persons entitled include all holders to whom overissued ceipts have been duly negotiated.

istory: En. Sec. 7-207, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-207.

30-7-208. Altered warehouse receipts. Where a blank in a nego- ble warehouse receipt has been filled in without authority, a purchaser for lue and without notice of the want of authority may treat the insertion as thorized. Any other unauthorized alteration leaves any receipt enforceable ainst the issuer according to its original tenor.

istory: En. Sec. 7-208, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-208.

30-7-209. Lien of warehouseman. (1) A warehouseman has a lien ainst the bailor on the goods covered by a warehouse receipt or on the pro- eds thereof in his possession for charges for storage or transportation cluding demurrage and terminal charges), insurance, labor, or charges esent or future in relation to the goods, and for expenses necessary for eservation of the goods or reasonably incurred in their sale pursuant to v. If the person on whose account the goods are held is liable for like arges or expenses in relation to other goods whenever deposited and it is ted in the receipt that a lien is claimed for charges and expenses in rela- n to other goods, the warehouseman also has a lien against him for such arges and expenses whether or not the other goods have been delivered by e warehouseman. But against a person to whom a negotiable warehouse receipt is duly negotiated a warehouseman's lien is limited to charges in an amount or at a rate specified on the receipt or if no charges are so specified then to a reasonable charge for storage of the goods covered by the receipt subsequent to the date of the receipt.

(2) The warehouseman may also reserve a security interest against the bailor for a maximum amount specified on the receipt for charges other than those specified in subsection (1), such as for money advanced and interest. Such a security interest is governed by the Chapter on Secured Transactions (Chapter 9).

(3) A warehouseman's lien for charges and expenses under subsection (1) or a security interest under subsection (2) is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid but is not effective against a person as to whom the document confers no right in the goods covered by it under 30-7-503.

(4) A warehouseman loses his lien on any goods which he voluntarily delivers or which he unjustifiably refuses to deliver.

History: En. Sec. 7-209, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-209.

30-7-210. Enforcement of warehouseman's lien. (1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in block or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. The notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) A warehouseman's lien on goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than 10 days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertise-
ent of the sale must be published once a week for 2 weeks consecutively
a newspaper of general circulation where the sale is to be held. The adver-
sement must include a description of the goods, the name of the person on
hose account they are being held, and the time and place of the sale. The
ale must take place at least 15 days after the first publication. If there is
o newspaper of general circulation where the sale is to be held, the adver-
sement must be posted at least 10 days before the sale in not less than six
onspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right
the goods may pay the amount necessary to satisfy the lien and the
asonable expenses incurred under this section. In that event the goods
ust not be sold, but must be retained by the warehouseman subject to the
rms of the receipt and this chapter.

(4) The warehouseman may buy at any public sale pursuant to this
ction.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's
en takes the goods free of any rights of persons against whom the lien was
alid, despite noncompliance by the warehouseman with the requirements of
is section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale
ursuant to this section but must hold the balance, if any, for delivery on
emand to any person to whom he would have been bound to deliver the
ods.

(7) The rights provided by this section shall be in addition to all other
ghts allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his
usiness the lien may be enforced in accordance with either subsection (1)
(2).

(9) The warehouseman is liable for damages caused by failure to comply
ith the requirements for sale under this section and in case of willful viola-
on is liable for conversion.

History: En. Sec. 7-210, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-210; amd. Sec. 2, Ch. 137, L. 79.

Part 3

Bills of Lading — Special Provisions

**30-7-301. Liability for nonreceipt or misdescription — "said to
ntain" — "shipper's load and count" — improper handling.** (1) A
nsignee of a nonnegotiable bill who has given value in good faith or a
lder to whom a negotiable bill has been duly negotiated relying in either
se upon the description therein of the goods, or upon the date therein
own, may recover from the issuer damages caused by the misdating of the
ll or the nonreceipt or misdescription of the goods, except to the extent
at the document indicates that the issuer does not know whether any part
all of the goods in fact were received or conform to the description, as

where the description is in terms of marks or labels or kind, quantity, or condition or the receipt or description is qualified by "contents or condition o contents of packages unknown", "said to contain", "shipper's weight, load and count" or the like, if such indication be true.

(2) When goods are loaded by an issuer who is a common carrier, the issuer must count the packages of goods if package freight and ascertain the kind and quantity if bulk freight. In such cases "shipper's weight, load and count" or other words indicating that the description was made by the shipper are ineffective except as to freight concealed by packages.

(3) When bulk freight is loaded by a shipper who makes available to the issuer adequate facilities for weighing such freight, an issuer who is a common carrier must ascertain the kind and quantity within a reasonable time after receiving the written request of the shipper to do so. In such cases "shipper's weight" or other words of like purport are ineffective.

(4) The issuer may by inserting in the bill the words "shipper's weight, load and count" or other words of like purport indicate that the goods were loaded by the shipper; and if such statement be true the issuer shall not be liable for damages caused by the improper loading. But their omission does not imply liability for such damages.

(5) The shipper shall be deemed to have guaranteed to the issuer the accuracy at the time of shipment of the description, marks, labels, number, kind, quantity, condition and weight, as furnished by him; and the shipper shall indemnify the issuer against damage caused by inaccuracies in such particulars. The right of the issuer to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

History: En. Sec. 7-301, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-301.

30-7-302. Through bills of lading and similar documents. (1) The issuer of a through bill of lading or other document embodying an undertaking to be performed in part by persons acting as its agents or by connecting carriers is liable to anyone entitled to recover on the document for any breach by such other persons or by a connecting carrier of its obligation under the document but to the extent that the bill covers an undertaking to be performed overseas or in territory not contiguous to the continental United States or an undertaking including matters other than transportation this liability may be varied by agreement of the parties.

(2) Where goods covered by a through bill of lading or other document embodying an undertaking to be performed in part by persons other than the issuer are received by any such person, he is subject with respect to his own performance while the goods are in his possession to the obligation of the issuer. His obligation is discharged by delivery of the goods to another such person pursuant to the document, and does not include liability for breach by any other such persons or by the issuer.

(3) The issuer of such through bill of lading or other document shall be entitled to recover from the connecting carrier or such other person in possession of the goods when the breach of the obligation under the document occurred, the amount it may be required to pay to anyone entitled to recover on the document therefor, as may be evidenced by any receipt, judgment, or transcript thereof, and the amount of any expense reasonably incurred by it

defending any action brought by anyone entitled to recover on the docu- ent therefor.

History: En. Sec. 7-302, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-302.

30-7-303. Diversion — reconsignment — change of instructions.) Unless the bill of lading otherwise provides, the carrier may deliver the oods to a person or destination other than that stated in the bill or may therwise dispose of the goods on instructions from:

(a) the holder of a negotiable bill; or

(b) the consignor on a nonnegotiable bill notwithstanding contrary nstructions from the consignee; or

(c) the consignee on a nonnegotiable bill in the absence of contrary nstructions from the consignor, if the goods have arrived at the billed destination or if the consignee is in possession of the bill; or

(d) the consignee on a nonnegotiable bill if he is entitled as against the onsignor to dispose of them.

(2) Unless such instructions are noted on a negotiable bill of lading, a erson to whom the bill is duly negotiated can hold the bailee according to ne original terms.

History: En. Sec. 7-303, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-303.

30-7-304. Bills of lading in a set. (1) Except where customary in verseas transportation, a bill of lading must not be issued in a set of parts. he issuer is liable for damages caused by violation of this subsection.

(2) Where a bill of lading is lawfully drawn in a set of parts, each of hich is numbered and expressed to be valid only if the goods have not been elivered against any other part, the whole of the parts constitute one bill.

(3) Where a bill of lading is lawfully issued in a set of parts and different arts are negotiated to different persons, the title of the holder to whom the rst due negotiation is made prevails as to both the document and the goods ven though any later holder may have received the goods from the carrier good faith and discharged the carrier's obligation by surrender of his part.

(4) Any person who negotiates or transfers a single part of a bill of lading rawn in a set is liable to holders of that part as if it were the whole set.

(5) The bailee is obliged to deliver in accordance with Part 4 of this chap- r against the first presented part of a bill of lading lawfully drawn in a set. uch delivery discharges the bailee's obligation on the whole bill.

History: En. Sec. 7-304, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-304.

30-7-305. Destination bills. (1) Instead of issuing a bill of lading to e consignor at the place of shipment a carrier may at the request of the onsignor procure the bill to be issued at destination or at any other place esignated in the request.

(2) Upon request of anyone entitled as against the carrier to control the oods while in transit and on surrender of any outstanding bill of lading or her receipt covering such goods, the issuer may procure a substitute bill to issued at any place designated in the request.

History: En. Sec. 7-305, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-305.

30-7-306. Altered bills of lading. An unauthorized alteration or filling in of a blank in a bill of lading leaves the bill enforceable according t its original tenor.

History: En. Sec. 7-306, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-306.

30-7-307. Lien of carrier. (1) A carrier has a lien on the goods covered by a bill of lading for charges subsequent to the date of its receipt o the goods for storage or transportation (including demurrage and termina charges) and for expenses necessary for preservation of the goods incident t their transportation or reasonably incurred in their sale pursuant to law. Bu against a purchaser for value of a negotiable bill of lading a carrier's lien i limited to charges stated in the bill or the applicable tariffs, or if no charge are stated then to a reasonable charge.

(2) A lien for charges and expenses under subsection (1) on goods whic the carrier was required by law to receive for transportation is effectiv against the consignor or any person entitled to the goods unless the carrie had notice that the consignor lacked authority to subject the goods to suc charges and expenses. Any other lien under subsection (1) is effective agains the consignor and any person who permitted the bailor to have control o possession of the goods unless the carrier had notice that the bailor lacke such authority.

(3) A carrier loses his lien on any goods which he voluntarily delivers o which he unjustifiably refuses to deliver.

History: En. Sec. 7-307, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-307.

30-7-308. Enforcement of carrier's lien. (1) A carrier's lien may b enforced by public or private sale of the goods, in bloc or in parcels, at an time or place and on any terms which are commercially reasonable, afte notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the propose sale and the time and place of any public sale. The fact that a better pric could have been obtained by a sale at a different time or in a differen method from that selected by the carrier is not of itself sufficient to establis that the sale was not made in a commercially reasonable manner. If the carrier either sells the goods in the usual manner in any recognized marke therefor or if he sells at the price current in such market at the time of hi sale or if he has otherwise sold in conformity with commercially reasonabl practices among dealers in the type of goods sold he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary t be offered to ensure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) Before any sale pursuant to this section any person claiming a righ in the goods may pay the amount necessary to satisfy the lien and th reasonable expenses incurred under this section. In that event the good must not be sold, but must be retained by the carrier subject to the term of the bill and this chapter.

(3) The carrier may buy at any public sale pursuant to this section.

(4) A purchaser in good faith of goods sold to enforce a carrier's lie takes the goods free of any rights of persons against whom the lien was valid despite noncompliance by the carrier with the requirements of this section.

(5) The carrier may satisfy his lien from the proceeds of any sale pur- uant to this section but must hold the balance, if any, for delivery on mand to any person to whom he would have been bound to deliver the ods.

(6) The rights provided by this section shall be in addition to all other ghts allowed by law to a creditor against his debtor.

(7) A carrier's lien may be enforced in accordance with either subsection) or the procedure set forth in subsection (2) of 30-7-210.

(8) The carrier is liable for damages caused by failure to comply with the quirements for sale under this section and in case of willful violation is lia- e for conversion.

History: En. Sec. 7-308, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-308.

30-7-309. Duty of care — contractual limitation of carrier's lia- lity. (1) A carrier who issues a bill of lading whether negotiable or non- gotiable must exercise the degree of care in relation to the goods which a asonably careful man would exercise under like circumstances. This subsec- on does not repeal or change any law or rule of law which imposes liability oon a common carrier for damages not caused by its negligence.

(2) Damages may be limited by a provision that the carrier's liability all not exceed a value stated in the document if the carrier's rates are pendent upon value and the consignor by the carrier's tariff is afforded an pportunity to declare a higher value or a value as lawfully provided in the riff, or where no tariff is filed he is otherwise advised of such opportunity; it no such limitation is effective with respect to the carrier's liability for nversion to its own use.

(3) Reasonable provisions as to the time and manner of presenting claims d instituting actions based on the shipment may be included in a bill of ding or tariff.

History: En. Sec. 7-309, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-309.

Part 4

Warehouse Receipts and Bills of Lading General Obligations

30-7-401. Irregularities in issue of receipt or bill or conduct of suer. The obligations imposed by this chapter on an issuer apply to a doc- nent of title regardless of the fact that:

(a) the document may not comply with the requirements of this chapter of any other law or regulation regarding its issue, form or content; or

(b) the issuer may have violated laws regulating the conduct of his busi- ss; or

(c) the goods covered by the document were owned by the bailee at the ne the document was issued; or

(d) the person issuing the document does not come within the definition warehouseman if it purports to be a warehouse receipt.

History: En. Sec. 7-401, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-401.

30-7-402. Duplicate receipt or bill — overissue. Neither a dupl cate nor any other document of title purporting to cover goods already repr sented by an outstanding document of the same issuer confers any right the goods, except as provided in the case of bills in a set, overissue of doc ments for fungible goods and substitutes for lost, stolen or destroyed doc ments. But the issuer is liable for damages caused by his overissue or failu to identify a duplicate document as such by conspicuous notation on its face

History: En. Sec. 7-402, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-402.

30-7-403. Obligation of warehouseman or carrier to deliver - excuse. (1) The bailee must deliver the goods to a person entitled under th document who complies with subsections (2) and (3), unless and to th extent that the bailee establishes any of the following:

(a) delivery of the goods to a person whose receipt was rightful as again the claimant;

(b) damage to or delay, loss or destruction of the goods for which th bailee is not liable;

(c) previous sale or other disposition of the goods in lawful enforceme of a lien or on warehouseman's lawful termination of storage;

(d) the exercise by a seller of his right to stop delivery pursuant to th provisions of the Chapter on Sales (30-2-705);

(e) a diversion, reconsignment or other disposition pursuant to the prov sions of this chapter (30-7-303) or tariff regulating such right;

(f) release, satisfaction or any other fact affording a personal defens against the claimant;

(g) any other lawful excuse.

(2) A person claiming goods covered by a document of title must satisf the bailee's lien where the bailee so requests or where the bailee is prohibite by law from delivering the goods until the charges are paid.

(3) Unless the person claiming is one against whom the document confe no right under 30-7-503(1), he must surrender for cancellation or notation partial deliveries any outstanding negotiable document covering the good and the bailee must cancel the document or conspicuously note the parti delivery thereon or be liable to any person to whom the document is dul negotiated.

(4) "Person entitled under the document" means holder in the case of negotiable document, or the person to whom delivery is to be made by th terms of or pursuant to written instructions under a nonnegotiable documen

History: En. Sec. 7-403, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-403.

30-7-404. No liability for good faith delivery pursuant t receipt or bill. A bailee who in good faith including observance of reason able commercial standards has received goods and delivered or otherwise dis posed of them according to the terms of the document of title or pursuan to this chapter is not liable therefor. This rule applies even though th person from whom he received the goods had no authority to procure th document or to dispose of the goods and even though the person to who he delivered the goods had no authority to receive them.

History: En. Sec. 7-404, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-404.

Part 5

Warehouse Receipts and Bills of Lading Negotiation and Transfer

30-7-501. Form of negotiation and requirements of "due nego- iation". (1) A negotiable document of title running to the order of a named erson is negotiated by his endorsement and delivery. After his endorsement blnk or to bearer any person can negotiate it by delivery alone.

(2) (a) A negotiable document of title is also negotiated by delivery alone hen by its original terms it runs to bearer;

(b) when a document running to the order of a named person is delivered him the effect is the same as if the document had been negotiated.

(3) Negotiation of a negotiable document of title after it has been ndorsed to a specified person requires endorsement by the special endorsee s well as delivery.

(4) A negotiable document of title is "duly negotiated" when it is nego- iated in the manner stated in this section to a holder who purchases it in ood faith without notice of any defense against or claim to it on the part f any person and for value, unless it is established that the negotiation is ot in the regular course of business or financing or involves receiving the ocument in settlement or payment of a money obligation.

(5) Endorsement of a nonnegotiable document neither makes it negotiable or adds to the transferee's rights.

(6) The naming in a negotiable bill of a person to be notified of the rrival of the goods does not limit the negotiability of the bill nor constitute otice to a purchaser thereof of any interest of such person in the goods.

History: En. Sec. 7-501, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-501.

30-7-502. Rights acquired by due negotiation. (1) Subject to the ollowing section and to the provisions of 30-7-205 on fungible goods, a older to whom a negotiable document of title has been duly negotiated cquires thereby:

(a) title to the document;

(b) title to the goods;

(c) all rights accruing under the law of agency or estoppel, including ights to goods delivered to the bailee after the document was issued; and

(d) the direct obligation of the issuer to hold or deliver the goods accord- ng to the terms of the document free of any defense or claim by him except hose arising under the terms of the document or under this chapter. In the ase of a delivery order the bailee's obligation accrues only upon acceptance nd the obligation acquired by the holder is that the issuer and any endorser vill procure the acceptance of the bailee.

(2) Subject to the following section, title and rights so acquired are not efeated by any stoppage of the goods represented by the document or by urrender of such goods by the bailee, and are not impaired even though the egotiation or any prior negotiation constituted a breach of duty or even hough any person has been deprived of possession of the document by mis- epresentation, fraud, accident, mistake, duress, loss, theft or conversion, or

even though a previous sale or other transfer of the goods or document ha been made to a third person.

History: En. Sec. 7-502, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-502.

30-7-503. Document of title to goods defeated in certain cases (1) A document of title confers no right in goods against a person who befor issuance of the document had a legal interest or a perfected security interes in them and who neither:

(a) delivered or entrusted them or any document of title covering them to the bailor or his nominee with actual or apparent authority to ship, stor or sell or with power to obtain delivery under this chapter (30-7-403) or wit power of disposition under this code (30-2-403 and 30-9-307) or other statut or rule of law; nor

(b) acquiesced in the procurement by the bailor or his nominee of an document of title.

(2) Title to goods based upon an unaccepted delivery order is subject t the rights of anyone to whom a negotiable warehouse receipt or bill of ladin covering the goods has been duly negotiated. Such a title may be defeate under the next section to the same extent as the rights of the issuer or a transferee from the issuer.

(3) Title to goods based upon a bill of lading issued to a freight forwarde is subject to the rights of anyone to whom a bill issued by the freight forwarder is duly negotiated; but delivery by the carrier in accordance with Part 4 of this chapter pursuant to its own bill of lading discharges the carrier's obligation to deliver.

History: En. Sec. 7-503, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-503.

30-7-504. Rights acquired in the absence of due negotiation — effect of diversion — seller's stoppage of delivery. (1) A transferee of a document, whether negotiable or nonnegotiable, to whom the document has been delivered but not duly negotiated, acquires the title and rights which his transferor had or had actual authority to convey.

(2) In the case of a nonnegotiable document, until but not after the bailee receives notification of the transfer, the rights of the transferee may be defeated:

(a) by those creditors of the transferor who could treat the sale as void under 30-2-402; or

(b) by a buyer from the transferor in ordinary course of business if the bailee has delivered the goods to the buyer or received notification of his rights; or

(c) as against the bailee by good faith dealings of the bailee with the transferor.

(3) A diversion or other change of shipping instructions by the consignor in a nonnegotiable bill of lading which causes the bailee not to deliver to the consignee defeats the consignee's title to the goods if they have been delivered to a buyer in ordinary course of business and in any event defeats the consignee's rights against the bailee.

(4) Delivery pursuant to a nonnegotiable document may be stopped by a seller under 30-2-705, and subject to the requirement of due notification

ere provided. A bailee honoring the seller's instructions is entitled to be demnified by the seller against any resulting loss or expense.

History: **En. Sec. 7-504, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-504.**

30-7-505. Endorser not a guarantor for other parties. The dorsement of a document of title issued by a bailee does not make the dorser liable for any default by the bailee or by previous endorsers.

History: **En. Sec. 7-505, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-505.**

30-7-506. Delivery without endorsement — right to compel ndorsement. The transferee of a negotiable document of title has a spefically enforceable right to have his transferor supply any necessary dorsement but the transfer becomes a negotiation only as of the time the dorsement is supplied.

History: **En. Sec. 7-506, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-506.**

30-7-507. Warranties on negotiation or transfer of receipt or ill. Where a person negotiates or transfers a document of title for value herwise than as a mere intermediary under the next following section, then less otherwise agreed he warrants to his immediate purchaser only in addion to any warranty made in selling the goods:

(a) that the document is genuine; and

(b) that he has no knowledge of any fact which would impair its validity worth; and

(c) that his negotiation or transfer is rightful and fully effective with spect to the title to the document and the goods it represents.

History: **En. Sec. 7-507, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-507.**

30-7-508. Warranties of collecting bank as to documents. A colcting bank or other intermediary known to be entrusted with documents on ehalf of another or with collection of a draft or other claim against delivery documents warrants by such delivery of the documents only its own good ith and authority. This rule applies even though the intermediary has purased or made advances against the claim or draft to be collected.

History: **En. Sec. 7-508, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-508.**

30-7-509. Receipt or bill — when adequate compliance with ommercial contract. The question whether a document is adequate to lfill the obligations of a contract for sale or the conditions of a credit is overned by the Chapters on Sales (Chapter 2) and on Letters of Credit Chapter 5).

History: **En. Sec. 7-509, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-509.**

Part 6

Warehouse Receipts and Bills of Lading Miscellaneous Provisions

30-7-601. Lost and missing documents. (1) If a document has been st, stolen or destroyed, a court may order delivery of the goods or issuance of a substitute document and the bailee may without liability to any persc comply with such order. If the document was negotiable the claimant mu post security approved by the court to indemnify any person who may suff loss as a result of nonsurrender of the document. If the document was n negotiable, such security may be required at the discretion of the court. Th court may also in its discretion order payment of the bailee's reasonable cos and counsel fees.

(2) A bailee who without court order delivers goods to a person claimir under a missing negotiable document is liable to any person injured thereb and if the delivery is not in good faith becomes liable for conversion. Deli ery in good faith is not conversion if made in accordance with a filed classif cation or tariff or, where no classification or tariff is filed, if the claimar posts security with the bailee in an amount at least double the value of th goods at the time of posting to indemnify any person injured by the deliver who files a notice of claim within 1 year after delivery.

History: **En. Sec. 7-601, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-601.**

30-7-602. Attachment of goods covered by a negotiable docu ment. Except where the document was originally issued upon delivery of th goods by a person who had no power to dispose of them, no lien attaches b virtue of any judicial process to goods in the possession of a bailee for whic a negotiable document of title is outstanding unless the document be firs surrendered to the bailee or its negotiation enjoined, and the bailee shall no be compelled to deliver the goods pursuant to process until the document i surrendered to him or impounded by the court. One who purchases the docu ment for value without notice of the process or injunction takes free of th lien imposed by judicial process.

History: **En. Sec. 7-602, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-602.**

30-7-603. Conflicting claims — interpleader. If more than on person claims title or possession of the goods, the bailee is excused fron delivery until he has had a reasonable time to ascertain the validity of th adverse claims or to bring an action to compel all claimants to interplead an may compel such interpleader, either in defending an action for nondeliver of the goods, or by original action, whichever is appropriate.

History: **En. Sec. 7-603, Ch. 264, L. 1963; R.C.M. 1947, 87A-7-603.**

Part 7

Penalties

30-7-701. Penalty for issuing receipt when goods have not been delivered. A warehouseman or any officer, agent, or servant of a warehouseman who issues or aids in issuing a receipt knowing that the goods for which such receipt is issued have not been actually received by such warehouseman, or are not under his actual control at the time of issuing such receipt, shall be guilty of a crime and upon conviction shall be punished for each offense by imprisonment not exceeding 5 years or by a fine not exceeding $5,000 or by both.

History: **En. Sec. 50, Ch. 154, L. 1917; re-en. Sec. 4128, R.C.M. 1921; re-en. Sec. 4128, R.C.M.1935; R.C.M. 1947, 88-150.**

30-7-702. Penalty for fraudulently issuing receipt. A warehouse- n, or any officer, agent, or servant of a warehouseman, who fraudulently ıes or aids in fraudulently issuing a receipt for goods knowing that it con- ns any false statement, shall be guilty of a crime and upon conviction shall punished for each offense by imprisonment not exceeding 1 year or by a e not exceeding $1,000 or by both.

listory: En. Sec. 51, Ch. 154, L. 1917; re-en. Sec. 4129, R.C.M. 1921; re-en. Sec. 4129, R.C.M. 5; R.C.M. 1947, 88-151.

30-7-703. Penalty for issuing duplicate negotiable receipt ıen original is outstanding without marking the same "dupli- te". A warehouseman, or any officer, agent, or servant of a warehouseman, o issues or aids in issuing a duplicate or additional negotiable receipt for ods knowing that a former negotiable receipt for the same goods or any t of them is outstanding and uncanceled, without plainly placing upon the e thereof the word "duplicate", except in the case of a lost, stolen, or stroyed receipt after proceedings as provided for in 30-7-601, shall be lty of a crime, and upon conviction shall be punished for each offense by prisonment not exceeding 5 years or by a fine not exceeding $5,000 or by h.

listory: En. Sec. 52, Ch. 154, L. 1917; re-en. Sec. 4130, R.C.M. 1921; re-en. Sec. 4130, R.C.M. 5; amd. Sec. 11-154, Ch. 264, L. 1963; R.C.M. 1947, 88-152.

30-7-704. Penalty for issuing negotiable receipt for goods ıich warehouseman owns. Where there are deposited with or held by varehouseman goods of which he is owner, either solely or jointly or in nmon with others, such warehouseman, or any of his officers, agents, or vants who knowing this ownership, issues or aids in issuing a negotiable eipt for such goods which does not state such ownership shall be guilty a crime, and upon conviction shall be punished for each offense by impris- nent not exceeding 1 year or by a fine not exceeding $1,000 or by both.

istory: En. Sec. 53, Ch. 154, L. 1917; re-en. Sec. 4131, R.C.M. 1921; re-en. Sec. 4131, R.C.M. 5; R.C.M. 1947, 88-153.

30-7-705. Penalty for delivering goods without obtaining pos- ssion of outstanding negotiable receipt. A warehouseman, or any icer, agent, or servant of a warehouseman who delivers goods out of the ssession of such warehouseman, knowing that a negotiable receipt, the gotiation of which would transfer the right to the possession of such goods outstanding and uncanceled, without obtaining the possession of such eipt at or before the time of such delivery, shall, except where the receipt been lost, stolen, or destroyed or the goods have been lawfully sold or posed of to satisfy a warehouseman's lien or because of their perishable hazardous nature, be guilty of a crime, and upon conviction shall be pun- ed for each offense by imprisonment not exceeding 1 year, or by a fine not eeding $1,000 or by both.

istory: En. Sec. 54, Ch. 154, L. 1917; re-en. Sec. 4132, R.C.M. 1921; re-en. Sec. 4132, R.C.M. 5; amd. Sec. 11-155, Ch. 264, L. 1963; R.C.M. 1947, 88-154.

30-7-706. Penalty for negotiating receipt for goods with defec- e title. Any person who deposits goods to which he has not title, or upon which there is a lien or mortgage, and who takes for such goods a negotiabl receipt which he afterwards negotiates for value with intent to deceive an without disclosing his want of title or the existence of the lien or mortgag shall be guilty of a crime, and upon conviction, shall be punished for eac offense by imprisonment not exceeding 1 year or by a fine not exceedin $1,000 or by both.

History: En. Sec. 55, Ch. 154, L. 1917; re-en. Sec. 4133, R.C.M. 1921; re-en. Sec. 4133, R.C.M 1935; R.C.M. 1947, 88-155.

CHAPTER 8

UNIFORM COMMERCIAL CODE INVESTMENT SECURITIES

Part 1 — Short Title and General Matters

Section
30-8-101. Short title.
30-8-102. Definitions and index of definitions.
30-8-103. Issuer's lien.
30-8-104. Effect of overissue — "overissue".
30-8-105. Securities negotiable — presumptions.
30-8-106. Applicability.
30-8-107. Securities deliverable — action for price.

Part 2 — Issue—Issuer

30-8-201. "Issuer".
30-8-202. Issuer's responsibility and defenses — notice of defect or defense.
30-8-203. Staleness as notice of defects or defenses.
30-8-204. Effect of issuer's restrictions on transfer.
30-8-205. Effect of unauthorized signature on issue.
30-8-206. Completion or alteration of instrument.
30-8-207. Rights of issuer with respect to registered owners.
30-8-208. Effect of signature of authenticating trustee, registrar or transfer agent.

Part 3 — Purchase

30-8-301. Rights acquired by purchaser — "adverse claim" — title acquired by bona fide purchaser.
30-8-302. "Bona fide purchaser".
30-8-303. "Broker".
30-8-304. Notice to purchaser of adverse claims.
30-8-305. Staleness as notice of adverse claims.
30-8-306. Warranties on presentment and transfer.
30-8-307. Effect of delivery without endorsement — right to compel endorsement.
30-8-308. Endorsement, how made — special endorsement — endorser not a guarantor — partial assignment.
30-8-309. Effect of endorsement without delivery.
30-8-310. Endorsement of security in bearer form.
30-8-311. Effect of unauthorized endorsement.
30-8-312. Effect of guaranteeing signature or endorsement.
30-8-313. When delivery to the purchaser occurs — purchaser's broker as holder.
30-8-314. Duty to deliver, when completed.
30-8-315. Action against purchaser based upon wrongful transfer.
30-8-316. Purchaser's right to requisites for registration of transfer on books.
30-8-317. Attachment or levy upon security.
30-8-318. No conversion by good faith delivery.
30-8-319. Statute of frauds.

8-320. Transfer or pledge within a central depository system.

Part 4 — Registration

8-401. Duty of issuer to register transfer.
8-402. Assurance that endorsements are effective.
8-403. Limited duty of inquiry.
8-404. Liability and nonliability for registration.
8-405. Lost, destroyed and stolen securities.
8-406. Duty of authenticating trustee, transfer agent or registrar.

Part 1

Short Title and General Matters

30-8-101. Short title. This chapter shall be known and may be cited Uniform Commercial Code—Investment Securities.

istory: En. Sec. 8-101, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-101.

30-8-102. Definitions and index of definitions. (1) In this chapter less the context otherwise requires:

(a) A "security" is an instrument which:

(i) is issued in bearer or registered form; and

(ii) is of a type commonly dealt in upon securities exchanges or markets commonly recognized in any area in which it is issued or dealt in as a edium for investment; and

(iii) is either one of a class or series or by its terms is divisible into a class series of instruments; and

(iv) evidences a share, participation or other interest in property or in an terprise or evidences an obligation of the issuer.

(b) A writing which is a security is governed by this chapter and not by iform Commercial Code—Commercial Paper even though it also meets the quirements of that chapter. This chapter does not apply to money.

(c) A security is in "registered form" when it specifies a person entitled the security or to the rights it evidences and when its transfer may be gistered upon books maintained for that purpose by or on behalf of an uer or the security so states.

(d) A security is in "bearer form" when it runs to bearer according to its ms and not by reason of any endorsement.

(2) A "subsequent purchaser" is a person who takes other than by orig- al issue.

(3) A "clearing corporation" is a corporation:

(a) at least 90% of the capital stock of which is held by or for one or ore persons, other than individuals, each of whom:

(i) is subject to supervision or regulation pursuant to the provisions of leral or state banking laws or state insurance laws and does not hold in cess of 20% of the capital stock of the corporation; or

(ii) is a broker or dealer or investment company registered under the curities Exchange Act of 1934 or the Investment Company Act of 1940 and es not hold in excess of 20% of the capital stock of the corporation; or

(iii) is a national securities exchange or association registered under a statute of the United States such as the Securities Exchange Act of 1934; and

(b) any remaining capital stock of which is held by individuals who have purchased such capital stock at or prior to the time of their taking office as directors of such corporation and who have purchased only so much of such capital stock as may be necessary to permit them to qualify as such directors.

(4) A "custodian bank" is any bank or trust company which is supervised and examined by state or federal authority having supervision over banks and which is acting as custodian for a clearing corporation.

(5) Other definitions applying to this chapter or to specified parts thereof and the sections in which they appear are:

"Adverse claim". 30-8-301.
"Bona fide purchaser". 30-8-302.
"Broker". 30-8-303.
"Guarantee of the signature". 30-8-402.
"Intermediary bank". 30-4-105.
"Issuer". 30-8-201.
"Overissue". 30-8-104.

(6) In addition Chapter 1 contains general definitions and principles of construction and interpretation applicable throughout this chapter.

History: En. Sec. 8-102, Ch. 264, L. 1963; amd. Sec. 1, Ch. 278, L. 1977; R.C.M. 1947, 87A-8-102.

30-8-103. Issuer's lien. A lien upon a security in favor of an issuer thereof is valid against a purchaser only if the right of the issuer to such lien is noted conspicuously on the security.

History: En. Sec. 8-103, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-103.

30-8-104. Effect of overissue — "overissue". (1) The provisions of this chapter which validate a security or compel its issue or reissue do not apply to the extent that validation, issue or reissue would result in overissue; but:

(a) if an identical security which does not constitute an overissue is reasonably available for purchase, the person entitled to issue or validation may compel the issuer to purchase and deliver such a security to him against surrender of the security, if any, which he holds; or

(b) if a security is not so available for purchase, the person entitled to issue or validation may recover from the issuer the price he or the last purchaser for value paid for it with interest from the date of his demand.

(2) "Overissue" means the issue of securities in excess of the amount which the issuer has corporate power to issue.

History: En. Sec. 8-104, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-104.

30-8-105. Securities negotiable — presumptions. (1) Securities governed by this chapter are negotiable instruments.

(2) In any action on a security:

(a) unless specifically denied in the pleading, each signature on the security or in a necessary endorsement is admitted;

(b) when the effectiveness of a signature is put in issue the burden of establishing it is on the party claiming under the signature but the signature is presumed to be genuine or authorized;

(c) when signatures are admitted or established production of the instru- ent entitles a holder to recover on it unless the defendant establishes a fense or a defect going to the validity of the security; and

(d) after it is shown that a defense or defect exists the plaintiff has the rden of establishing that he or some person under whom he claims is a rson against whom the defense or defect is ineffective (30-8-202).

istory: En. Sec. 8-105, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-105.

30-8-106. Applicability. The validity of a security and the rights and ties of the issuer with respect to registration of transfer are governed by e law (including the conflict of laws rules) of the jurisdiction of organiza- n of the issuer.

istory: En. Sec. 8-106, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-106.

30-8-107. Securities deliverable — action for price. (1) Unless herwise agreed and subject to any applicable law or regulation respecting ort sales, a person obligated to deliver securities may deliver any security the specified issue in bearer form or registered in the name of the trans- ee or endorsed to him or in blank.

(2) When the buyer fails to pay the price as it comes due under a con- ict of sale the seller may recover the price:

(a) of securities accepted by the buyer; and

(b) of other securities if efforts at their resale would be unduly burden- me or if there is no readily available market for their resale.

istory: En. Sec. 8-107, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-107.

Part 2

Issue — Issuer

30-8-201. "Issuer". (1) With respect to obligations on or defenses to a curity "issuer" includes a person who:

(a) places or authorizes the placing of his name on a security (otherwise an as authenticating trustee, registrar, transfer agent or the like) to evi- nce that it represents a share, participation or other interest in his prop- y or in an enterprise or to evidence his duty to perform an obligation idenced by the security; or

(b) directly or indirectly creates fractional interests in his rights or prop- y which fractional interests are evidenced by securities; or

(c) becomes responsible for or in place of any other person described as issuer in this section.

(2) With respect to obligations on or defenses to a security a guarantor an issuer to the extent of his guaranty whether or not his obligation is ted on the security.

(3) With respect to registration of transfer (Part 4 of this chapter) ssuer" means a person on whose behalf transfer books are maintained.

istory: En. Sec. 8-201, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-201.

30-8-202. Issuer's responsibility and defenses — notice of efect or defense. (1) Even against a purchaser for value and without notice, the terms of a security include those stated on the security and thos made part of the security by reference to another instrument, indenture c document or to a constitution, statute, ordinance, rule, regulation, order c the like to the extent that the terms so referred to do not conflict with th stated terms. Such a reference does not of itself charge a purchaser for valu with notice of a defect going to the validity of the security even though th security expressly states that a person accepting it admits such notice.

(2) (a) A security other than one issued by a government or governmenta agency or unit even though issued with a defect going to its validity is vali in the hands of a purchaser for value and without notice of the particula defect unless the defect involves a violation of constitutional provisions i which case the security is valid in the hands of a subsequent purchaser fo value and without notice of the defect.

(b) The rule of subparagraph (a) applies to an issuer which is a govern ment or governmental agency or unit only if either there has been substantia compliance with the legal requirements governing the issue or the issuer ha received a substantial consideration for the issue as a whole or for the partic ular security and a stated purpose of the issue is one for which the issue has power to borrow money or issue the security.

(3) Except as otherwise provided in the case of certain unauthorize signatures on issue (30-8-205), lack of genuineness of a security is a complet defense even against a purchaser for value and without notice.

(4) All other defenses of the issuer including nondelivery and conditiona delivery of the security are ineffective against a purchaser for value who ha taken without notice of the particular defense.

(5) Nothing in this section shall be construed to affect the right of a party to a "when, as and if issued" or a "when distributed" contract to cancel the contract in the event of a material change in the character of th security which is the subject of the contract or in the plan or arrangemen pursuant to which such security is to be issued or distributed.

History: En. Sec. 8-202, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-202.

30-8-203. Staleness as notice of defects or defenses. (1) After ar act or event which creates a right to immediate performance of the principa obligation evidenced by the security or which sets a date on or after whicl the security is to be presented or surrendered for redemption or exchange a purchaser is charged with notice of any defect in its issue or defense of th issuer:

(a) if the act or event is one requiring the payment of money or the delivery of securities or both on presentation or surrender of the security and such funds or securities are available on the date set for payment o exchange and he takes the security more than 1 year after that date; and

(b) if the act or event is not covered by paragraph (a) and he takes the security more than 2 years after the date set for surrender or presentatio or the date on which such performance became due.

(2) A call which has been revoked is not within subsection (1).

History: En. Sec. 8-203, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-203.

30-8-204. Effect of issuer's restrictions on transfer. Unless noted conspicuously on the security a restriction on transfer imposed by the issuer

n though otherwise lawful is ineffective except against a person with actu-
knowledge of it.

istory: En. Sec. 8-204, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-204.

30-8-205. Effect of unauthorized signature on issue. An
authorized signature placed on a security prior to or in the course of issue
neffective except that the signature is effective in favor of a purchaser for
ue and without notice of the lack of authority if the signing has been done

a) an authenticating trustee, registrar, transfer agent or other person
rusted by the issuer with the signing of the security or of similar securities
their immediate preparation for signing; or

b) an employee of the issuer or of any of the foregoing entrusted with
ponsible handling of the security.

istory: En. Sec. 8-205, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-205.

30-8-206. Completion or alteration of instrument. (1) Where a
urity contains the signatures necessary to its issue or transfer but is
omplete in any other respect:

a) any person may complete it by filling in the blanks as authorized; and

b) even though the blanks are incorrectly filled in, the security as com-
ted is enforceable by a purchaser who took it for value and without notice
such incorrectness.

2) A complete security which has been improperly altered even though
udulently remains enforceable but only according to its original terms.

istory: En. Sec. 8-206, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-206.

30-8-207. Rights of issuer with respect to registered owners.
 Prior to due presentment for registration of transfer of a security in
istered form the issuer or indenture trustee may treat the registered owner
the person exclusively entitled to vote, to receive notifications and other-
e to exercise all the rights and powers of an owner.

2) Nothing in this chapter shall be construed to affect the liability of the
istered owner of a security for calls, assessments or the like.

istory: En. Sec. 8-207, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-207.

**30-8-208. Effect of signature of authenticating trustee, regis-
ar or transfer agent.** (1) A person placing his signature upon a security
authenticating trustee, registrar, transfer agent or the like warrants to a
chaser for value without notice of the particular defect that:

a) the security is genuine and in proper form; and

b) his own participation in the issue of the security is within his capacity
l within the scope of the authorization received by him from the issuer;
l

c) he has reasonable grounds to believe that the security is in the form
l within the amount the issuer is authorized to issue.

2) Unless otherwise agreed, a person by so placing his signature does not
ume responsibility for the validity of the security in other respects.

istory: En. Sec. 8-208, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-208.

Part 3

Purchase

30-8-301. Rights acquired by purchaser — “adverse claim” title acquired by bona fide purchaser. (1) Upon delivery of a securi the purchaser acquires the rights in the security which his transferor had had actual authority to convey except that a purchaser who has himself be a party to any fraud or illegality affecting the security or who as a pri holder had notice of an adverse claim cannot improve his position by taki from a later bona fide purchaser. “Adverse claim” includes a claim that transfer was or would be wrongful or that a particular adverse person is t owner of or has an interest in the security.

(2) A bona fide purchaser in addition to acquiring the rights of a pu chaser also acquires the security free of any adverse claim.

(3) A purchaser of a limited interest acquires rights only to the extent the interest purchased.

History: En. Sec. 8-301, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-301.

30-8-302. “Bona fide purchaser”. A “bona fide purchaser” is a pu chaser for value in good faith and without notice of any adverse claim w takes delivery of a security in bearer form or of one in registered form issue to him or endorsed to him or in blank.

History: En. Sec. 8-302, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-302.

30-8-303. “Broker”. “Broker” means a person engaged for all or pa of his time in the business of buying and selling securities, who in the tran action concerned acts for, or buys a security from or sells a security to a cu tomer. Nothing in this chapter determines the capacity in which a perso acts for purposes of any other statute or rule to which such person is subject

History: En. Sec. 8-303, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-303.

30-8-304. Notice to purchaser of adverse claims. (1) A purchase (including a broker for the seller or buyer but excluding an intermediar bank) of a security is charged with notice of adverse claims if:

(a) the security whether in bearer or registered form has been endorse “for collection” or “for surrender” or for some other purpose not involvin transfer; or

(b) the security is in bearer form and has on it an unambiguous state ment that it is the property of a person other than the transferor. The mer writing of a name on a security is not such a statement.

(2) The fact that the purchaser (including a broker for the seller o buyer) has notice that the security is held for a third person or is registere in the name of or endorsed by a fiduciary does not create a duty of inquir into the rightfulness of the transfer or constitute notice of adverse claims. I however, the purchaser (excluding an intermediary bank) has knowledge tha the proceeds are being used or that the transaction is for the individual bene fit of the fiduciary or otherwise in breach of duty, the purchaser is charge with notice of adverse claims.

History: En. Sec. 8-304, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-304.

0-8-305. Staleness as notice of adverse claims. An act or event ch creates a right to immediate performance of the principal obligation lenced by the security or which sets a date on or after which the security o be presented or surrendered for redemption or exchange does not of lf constitute any notice of adverse claims except in the case of a purchase:

ı) after 1 year from any date set for such presentment or surrender for emption or exchange; or

ɔ) after 6 months from any date set for payment of money against pre- tation or surrender of the security if funds are available for payment on t date.

istory: En. Sec. 8-305, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-305.

0-8-306. Warranties on presentment and transfer. (1) A person) presents a security for registration of transfer or for payment or hange warrants to the issuer that he is entitled to the registration, pay- ıt or exchange. But a purchaser for value without notice of adverse claims) receives a new, reissued or reregistered security on registration of trans- warrants only that he has no knowledge of any unauthorized signature -8-311) in a necessary endorsement.

2) A person by transferring a security to a purchaser for value warrants y that:

ı) his transfer is effective and rightful; and

ɔ) the security is genuine and has not been materially altered; and

:) he knows no fact which might impair the validity of the security.

3) Where a security is delivered by an intermediary known to be rusted with delivery of the security on behalf of another or with collection a draft or other claim against such delivery, the intermediary by such very warrants only his own good faith and authority even though he has chased or made advances against the claim to be collected against the very.

ł) A pledgee or other holder for security who redelivers the security eived, or after payment and on order of the debtor delivers that security ı third person makes only the warranties of an intermediary under subsec- ı (3).

5) A broker gives to his customer and to the issuer and a purchaser the ranties provided in this section and has the rights and privileges of a pur- ser under this section. The warranties of and in favor of the broker acting ın agent are in addition to applicable warranties given by and in favor of customer.

istory: En. Sec. 8-306, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-306.

0-8-307. Effect of delivery without endorsement — right to npel endorsement. Where a security in registered form has been deliv- l to a purchaser without a necessary endorsement he may become a bona purchaser only as of the time the endorsement is supplied, but against transferor the transfer is complete upon delivery and the purchaser has ɔecifically enforceable right to have any necessary endorsement supplied.

istory: En. Sec. 8-307, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-307.

30-8-308. Endorsement, how made — special endorsement — endorser not a guarantor — partial assignment. (1) An endorsemen of a security in registered form is made when an appropriate person signs o it or on a separate document an assignment or transfer of the security or power to assign or transfer it or when the signature of such person is writte without more upon the back of the security.

(2) An endorsement may be in blank or special. An endorsement in blan includes an endorsement to bearer. A special endorsement specifies th person to whom the security is to be transferred, or who has power to transfer it. A holder may convert a blank endorsement into a special endorsement

(3) "An appropriate person" in subsection (1) means:

(a) the person specified by the security or by special endorsement to b entitled to the security; or

(b) where the person so specified is described as a fiduciary but is n longer serving in the described capacity,—either that person or his successo or

(c) where the security or endorsement so specifies more than one perso as fiduciaries and one or more are no longer serving in the describe capacity,—the remaining fiduciary or fiduciaries, whether or not a successo has been appointed or qualified; or

(d) where the person so specified is an individual and is without capacit to act by virtue of death, incompetence, infancy or otherwise,—his executo administrator, guardian or like fiduciary; or

(e) where the security or endorsement so specified more than one perso as tenants by the entirety or with right of survivorship and by reason o death all cannot sign,—the survivor or survivors; or

(f) a person having power to sign under applicable law or controllin instrument; or

(g) to the extent that any of the foregoing persons may act through a agent,—his authorized agent.

(4) Unless otherwise agreed the endorser by his endorsement assumes n obligation that the security will be honored by the issuer.

(5) An endorsement purporting to be only of part of a security representing units intended by the issuer to be separately transferable is effectiv to the extent of the endorsement.

(6) Whether the person signing is appropriate is determined as of th date of signing and an endorsement by such a person does not becom unauthorized for the purposes of this chapter by virtue of any subsequen change of circumstances.

(7) Failure of a fiduciary to comply with a controlling instrument or wit the law of the state having jurisdiction of the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer, doe not render his endorsement unauthorized for the purposes of this chapter.

History: En. Sec. 8-308, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-308.

30-8-309. Effect of endorsement without delivery. An endorsement of a security whether special or in blank does not constitute a transfe until delivery of the security on which it appears or if the endorsement is o a separate document until delivery of both the document and the security.

History: En. Sec. 8-309, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-309.

30-8-310. Endorsement of security in bearer form. An endorse- ent of a security in bearer form may give notice of adverse claims)-8-304) but does not otherwise affect any right to registration the holder ay possess.

History: En. Sec. 8-310, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-310.

30-8-311. Effect of unauthorized endorsement. Unless the owner s ratified an unauthorized endorsement or is otherwise precluded from serting its ineffectiveness:

(a) he may assert its ineffectiveness against the issuer or any purchaser her than a purchaser for value and without notice of adverse claims who s in good faith received a new, reissued or reregistered security on registra- on of transfer; and

(b) an issuer who registers the transfer of a security upon the unauthor- ed endorsement is subject to liability for improper registration (30-8-404).

History: En. Sec. 8-311, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-311.

30-8-312. Effect of guaranteeing signature or endorsement. (1) ıy person guaranteeing a signature of an endorser of a security warrants at at the time of signing:

(a) the signature was genuine; and

(b) the signer was an appropriate person to endorse (30-8-308); and

(c) the signer had legal capacity to sign. But the guarantor does not herwise warrant the rightfulness of the particular transfer.

(2) Any person may guarantee an endorsement of a security and by so ing warrants not only the signature (subsection 1) but also the rightfulness the particular transfer in all respects. But no issuer may require a guar- tee of endorsement as a condition to registration of transfer.

(3) The foregoing warranties are made to any person taking or dealing th the security in reliance on the guarantee and the guarantor is liable to ch person for any loss resulting from breach of the warranties.

History: En. Sec. 8-312, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-312.

30-8-313. When delivery to the purchaser occurs — purchaser's oker as holder. (1) Delivery to a purchaser occurs when:

(a) he or a person designated by him acquires possession of a security; or

(b) his broker acquires possession of a security specially endorsed to or sued in the name of the purchaser; or

(c) his broker sends him confirmation of the purchase and also by book try or otherwise identifies a specific security in the broker's possession as longing to the purchaser; or

(d) with respect to an identified security to be delivered while still in the ssession of a third person when that person acknowledges that he holds for e purchaser; or

(e) appropriate entries on the books of a clearing corporation are made ıder 30-8-320.

(2) The purchaser is the owner of a security held for him by his broker, ıt is not the holder except as specified in subparagraphs (b), (c) and (e) of bsection (1). Where a security is part of a fungible bulk the purchaser is e owner of a proportionate property interest in the fungible bulk.

(3) Notice of an adverse claim received by the broker or by the purchase after the broker takes delivery as a holder for value is not effective either a to the broker or as to the purchaser. However, as between the broker and th purchaser the purchaser may demand delivery of an equivalent security as t which no notice of an adverse claim has been received.

History: En. Sec. 8-313, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-313.

30-8-314. Duty to deliver, when completed. (1) Unless otherwise agreed where a sale of a security is made on an exchange or otherwise through brokers:

(a) the selling customer fulfills his duty to deliver when he places such a security in the possession of the selling broker or of a person designated by the broker or if requested causes an acknowledgment to be made to the selling broker that it is held for him; and

(b) the selling broker including a correspondent broker acting for a selling customer fulfills his duty to deliver by placing the security or a like security in the possession of the buying broker or a person designated by him or by effecting clearance of the sale in accordance with the rules of the exchange on which the transaction took place.

(2) Except as otherwise provided in this section and unless otherwise agreed, a transferor's duty to deliver a security under a contract of purchase is not fulfilled until he places the security in form to be negotiated by the purchaser in the possession of the purchaser or of a person designated by him or at the purchaser's request causes an acknowledgment to be made to the purchaser that it is held for him. Unless made on an exchange a sale to a broker purchasing for his own account is within this subsection and not within subsection (1).

History: En. Sec. 8-314, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-314.

30-8-315. Action against purchaser based upon wrongful transfer. (1) Any person against whom the transfer of a security is wrongful for any reason, including his incapacity, may against anyone except a bona fide purchaser reclaim possession of the security or obtain possession of any new security evidencing all or part of the same rights or have damages.

(2) If the transfer is wrongful because of an unauthorized endorsement, the owner may also reclaim or obtain possession of the security or new security even from a bona fide purchaser if the ineffectiveness of the purported endorsement can be asserted against him under the provisions of this chapter on unauthorized endorsements (30-8-311).

(3) The right to obtain or reclaim possession of a security may be specifically enforced and its transfer enjoined and the security impounded pending the litigation.

History: En. Sec. 8-315, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-315.

30-8-316. Purchaser's right to requisites for registration of transfer on books. Unless otherwise agreed the transferor must on due demand supply his purchaser with any proof of his authority to transfer or with any other requisite which may be necessary to obtain registration of the transfer of the security but if the transfer is not for value a transferor need not do so unless the purchaser furnishes the necessary expenses. Failure to mply with a demand made within a reasonable time gives the purchaser e right to reject or rescind the transfer.

History: En. Sec. 8-316, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-316.

30-8-317. Attachment or levy upon security. (1) No attachment or vy upon a security or any share or other interest evidenced thereby which outstanding shall be valid until the security is actually seized by the officer aking the attachment or levy but a security which has been surrendered to e issuer may be attached or levied upon at the source.

(2) A creditor whose debtor is the owner of a security shall be entitled such aid from courts of appropriate jurisdiction, by injunction or otherse, in reaching such security or in satisfying the claim by means thereof as allowed at law or in equity in regard to property which cannot readily be tached or levied upon by ordinary legal process.

History: En. Sec. 8-317, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-317.

30-8-318. No conversion by good faith delivery. An agent or ilee who in good faith (including observance of reasonable commercial andards if he is in the business of buying, selling or otherwise dealing with curities) has received securities and sold, pledged or delivered them accordg to the instructions of his principal is not liable for conversion or for rticipation in breach of fiduciary duty although the principal has no right dispose of them.

History: En. Sec. 8-318, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-318.

30-8-319. Statute of frauds. A contract for the sale of securities is t enforceable by way of action or defense unless:

(a) there is some writing signed by the party against whom enforcement sought or by his authorized agent or broker sufficient to indicate that a ntract has been made for sale of a stated quantity of described securities a defined or stated price; or

(b) delivery of the security has been accepted or payment has been made t the contract is enforceable under this provision only to the extent of such livery or payment; or

(c) within a reasonable time a writing in confirmation of the sale or purase and sufficient against the sender under paragraph (a) has been received the party against whom enforcement is sought and he has failed to send itten objection to its contents within 10 days after its receipt; or

(d) the party against whom enforcement is sought admits in his pleading, stimony or otherwise in court that a contract was made for sale of a stated antity of described securities at a defined or stated price.

History: En. Sec. 8-319, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-319.

30-8-320. Transfer or pledge within a central depository sysm. (1) If a security:

(a) is in the custody of a clearing corporation or of a custodian bank or nominee of either subject to the instructions of the clearing corporation; d

(b) is in bearer form or endorsed in blank by an appropriate person or gistered in the name of the clearing corporation or custodian bank or a minee of either; and

(c) is shown on the account of a transferor or pledgor on the books of th clearing corporation; then, in addition to other methods, a transfer or pledg of the security or any interest therein may be effected by the making c appropriate entries on the books of the clearing corporation reducing th account of the transferor or pledgor and increasing the account of the transferee or pledgee by the amount of the obligation or the number of shares o rights transferred or pledged.

(2) Under this section entries may be with respect to like securities o interests therein as a part of a fungible bulk and may refer merely to a quantity of a particular security without reference to the name of the registere owner, certificate or bond number or the like and, in appropriate cases, ma be on a net basis taking into account other transfers or pledges of the sam security.

(3) A transfer or pledge under this section has the effect of a delivery o a security in bearer form or duly endorsed in blank (30-8-301) representin the amount of the obligation or the number of shares or rights transferre or pledged. If a pledge or the creation of a security interest is intended, th making of entries has the effect of a taking of delivery by the pledgee or a secured party (30-9-304 and 30-9-305). A transferee or pledgee under thi section is a holder.

(4) A transfer or pledge under this section does not constitute a registration of transfer under Part 4 of this chapter.

(5) That entries made on the books of the clearing corporation as provided in subsection (1) are not appropriate does not affect the validity or effect of the entries nor the liabilities or obligations of the clearing corporation to any person adversely affected thereby.

(6) Under this section a clearing corporation shall, upon written request, furnish to any issuer within a reasonable time a list disclosing the names of all persons who have securities of the issuer in their account with a depository and including a statement of the principal amount or number of units of each such security of the issuer on deposit. The clearing corporation may charge the issuer a fee for such written list, but the fee shall bear a reasonable relation to the cost of furnishing such list.

History: **En. Sec. 8-320, Ch. 264, L. 1963; amd. Sec. 2, Ch. 278, L. 1977; R.C.M. 1947, 87A-8-320.**

Part 4

Registration

30-8-401. Duty of issuer to register transfer. (1) Where a security in registered form is presented to the issuer with a request to register transfer, the issuer is under a duty to register the transfer as requested if:

(a) the security is endorsed by the appropriate person or persons (30-8-308); and

(b) reasonable assurance is given that those endorsements are genuine and effective (30-8-402); and

(c) the issuer has no duty to inquire into adverse claims or has discharged any such duty (30-8-403); and

(d) any applicable law relating to the collection of taxes has been com- lied with; and

(e) the transfer is in fact rightful or is to a bona fide purchaser.

(2) Where an issuer is under a duty to register a transfer of a security the issuer is also liable to the person presenting it for registration or his principal or loss resulting from any unreasonable delay in registration or from failure or refusal to register the transfer.

History: En. Sec. 8-401, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-401.

30-8-402. Assurance that endorsements are effective. (1) The ssuer may require the following assurance that each necessary endorsement 30-8-308) is genuine and effective:

(a) in all cases, a guarantee of the signature (subsection (1) of 30-8-312) f the person endorsing; and

(b) where the endorsement is by an agent, appropriate assurance of uthority to sign;

(c) where the endorsement is by a fiduciary, appropriate evidence of ppointment or incumbency;

(d) where there is more than one fiduciary, reasonable assurance that all who are required to sign have done so;

(e) where the endorsement is by a person not covered by any of the fore- oing, assurance appropriate to the case corresponding as nearly as may be o the foregoing.

(2) A "guarantee of the signature" in subsection (1) means a guarantee igned by or on behalf of a person reasonably believed by the issuer to be esponsible. The issuer may adopt standards with respect to responsibility rovided such standards are not manifestly unreasonable.

(3) "Appropriate evidence of appointment or incumbency" in subsection 1) means:

(a) in the case of a fiduciary appointed or qualified by a court, a certifi- ate issued by or under the direction or supervision of that court or an offi- er thereof and dated within 60 days before the date of presentation for ransfer; or

(b) in any other case, a copy of a document showing the appointment or certificate issued by or on behalf of a person reasonably believed by the ssuer to be responsible or, in the absence of such a document or certificate, ther evidence reasonably deemed by the issuer to be appropriate. The issuer ay adopt standards with respect to such evidence provided such standards re not manifestly unreasonable. The issuer is not charged with notice of the ontents of any document obtained pursuant to this paragraph (b) except to he extent that the contents relate directly to the appointment or incum- ency.

(4) The issuer may elect to require reasonable assurance beyond that pecified in this section but if it does so and for a purpose other than that pecified in subsection (3)(b) both requires and obtains a copy of a will, rust, indenture, articles of copartnership, bylaws or other controlling instru- ent it is charged with notice of all matters contained therein affecting the ransfer.

History: En. Sec. 8-402, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-402.

30-8-403. Limited duty of inquiry. (1) An issuer to whom a security is presented for registration is under a duty to inquire into adverse claims if:

(a) a written notification of an adverse claim is received at a time and in a manner which affords the issuer a reasonable opportunity to act on it prior to the issuance of a new, reissued or reregistered security and the notification identifies the claimant, the registered owner and the issue of which the security is a part and provides an address for communications directed to the claimant; or

(b) the issuer is charged with notice of an adverse claim from a controlling instrument which it has elected to require under subsection (4) of 30-8-402.

(2) The issuer may discharge any duty of inquiry by any reasonable means, including notifying an adverse claimant by registered or certified mail at the address furnished by him or if there be no such address at his residence or regular place of business that the security has been presented for registration of transfer by a named person, and that the transfer will be registered unless within 30 days from the date of mailing the notification, either:

(a) an appropriate restraining order, injunction or other process issues from a court of competent jurisdiction; or

(b) an indemnity bond sufficient in the issuer's judgment to protect the issuer and any transfer agent, registrar or other agent of the issuer involved, from any loss which it or they may suffer by complying with the adverse claim is filed with the issuer.

(3) Unless an issuer is charged with notice of an adverse claim from a controlling instrument which it has elected to require under subsection (4) of 30-8-402 or receives notification of an adverse claim under subsection (1) of this section, where a security presented for registration is endorsed by the appropriate person or persons the issuer is under no duty to inquire into adverse claims. In particular:

(a) an issuer registering a security in the name of a person who is a fiduciary or who is described as a fiduciary is not bound to inquire into the existence, extent, or correct description of the fiduciary relationship and thereafter the issuer may assume without inquiry that the newly registered owner continues to be the fiduciary until the issuer receives written notice that the fiduciary is no longer acting as such with respect to the particular security;

(b) an issuer registering transfer on an endorsement by a fiduciary is not bound to inquire whether the transfer is made in compliance with a controlling instrument or with the law of the state having jurisdiction of the fiduciary relationship, including any law requiring the fiduciary to obtain court approval of the transfer; and

(c) the issuer is not charged with notice of the contents of any court record or file or other recorded or unrecorded document even though the document is in its possession and even though the transfer is made on the endorsement of a fiduciary to the fiduciary himself or to his nominee.

History: En. Sec. 8-403, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-403.

30-8-404. Liability and nonliability for registration. (1) Except as otherwise provided in any law relating to the collection of taxes, the issuer s not liable to the owner or any other person suffering loss as a result of he registration of a transfer of a security if:

(a) there were on or with the security the necessary endorsements 30-8-308); and

(b) the issuer had no duty to inquire into adverse claims or has disharged any such duty (30-8-403).

(2) Where an issuer has registered a transfer of a security to a person not ntitled to it the issuer on demand must deliver a like security to the true wner unless:

(a) the registration was pursuant to subsection (1); or

(b) the owner is precluded from asserting any claim for registering the ransfer under subsection (1) of the following section; or

(c) such delivery would result in overissue, in which case the issuer's liaility is governed by 30-8-104.

History: En. Sec. 8-404, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-404.

30-8-405. Lost, destroyed and stolen securities. (1) Where a ecurity has been lost, apparently destroyed or wrongfully taken and the wner fails to notify the issuer of that fact within a reasonable time after he as notice of it and the issuer registers a transfer of the security before eceiving such a notification, the owner is precluded from asserting against ne issuer any claim for registering the transfer under the preceding section r any claim to a new security under this section.

(2) Where the owner of a security claims that the security has been lost, estroyed or wrongfully taken, the issuer must issue a new security in place f the original security if the owner:

(a) so requests before the issuer has notice that the security has been cquired by a bona fide purchaser; and

(b) files with the issuer a sufficient indemnity bond; and

(c) satisfies any other reasonable requirements imposed by the issuer.

(3) If, after the issue of the new security, a bona fide purchaser of the riginal security presents it for registration of transfer, the issuer must regiser the transfer unless registration would result in overissue, in which event ne issuer's liability is governed by 30-8-104. In addition to any rights on the ndemnity bond, the issuer may recover the new security from the person to hom it was issued or any person taking under him except a bona fide purhaser.

History: En. Sec. 8-405, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-405.

30-8-406. Duty of authenticating trustee, transfer agent or egistrar. (1) Where a person acts as authenticating trustee, transfer agent, egistrar, or other agent for an issuer in the registration of transfers of its ecurities or in the issue of new securities or in the cancellation of surrenered securities:

(a) he is under a duty to the issuer to exercise good faith and due diliènce in performing his functions; and

(b) he has with regard to the particular functions he performs the same bligation to the holder or owner of the security and has the same rights and rivileges as the issuer has in regard to those functions.

(2) Notice to an authenticating trustee, transfer agent, registrar or other such agent is notice to the issuer with respect to the functions performed by the agent.

History: **En. Sec. 8-406, Ch. 264, L. 1963; R.C.M. 1947, 87A-8-406.**

CHAPTER 9

UNIFORM COMMERCIAL CODE SECURED TRANSACTIONS SALES OF ACCOUNTS, CONTRACT RIGHTS, AND CHATTEL PAPER

Part 1 — Short Title, Applicability, and Definitions

Section
30-9-101. Short title.
30-9-102. Policy and scope of chapter.
30-9-103. Accounts, contract rights, general intangibles and equipment relating to another jurisdiction; and incoming goods already subject to a security interest.
30-9-104. Transactions excluded from chapter.
30-9-105. Definitions and index of definitions.
30-9-106. Definitions — "account" — "contract right" — "general intangibles".
30-9-107. Definitions — "purchase money security interest".
30-9-108. When after-acquired collateral not security for antecedent debt.
30-9-109. Classification of goods — "consumer goods" — "equipment" — "farm products" — "inventory".
30-9-110. Sufficiency of description.
30-9-111. Applicability of bulk transfer laws.
30-9-112. Where collateral is not owned by debtor.
30-9-113. Security interests arising under Chapter on Sales.

Part 2 — Validity of Security Agreement and Rights of Parties Thereto

30-9-201. General validity of security agreement.
30-9-202. Title to collateral immaterial.
30-9-203. Enforceability of security interest — proceeds, formal requisites.
30-9-204. When security interest attaches — after-acquired property — future advances.
30-9-205. Use or disposition of collateral without accounting permissible.
30-9-206. Agreement not to assert defenses against assignee — modification of sales warranties where security agreement exists.
30-9-207. Rights and duties when collateral is in secured party's possession.
30-9-208. Request for statement of account or list of collateral.

Part 3 — Rights of Third Parties—Perfected and Unperfected Security Interests Rules of Priority

30-9-301. Persons who take priority over unperfected security interests — "lien creditor".
30-9-302. When filing is required to perfect security interest — security interests to which filing provisions of this chapter do not apply.
30-9-303. When security interest is perfected — continuity of perfection.
30-9-304. Perfection of security interest in instruments, documents and goods covered by documents — perfection by permissive filing — temporary perfection without filing or transfer of possession.
30-9-305. When possession by secured party perfects security interest without filing.
30-9-306. "Proceeds" — secured party's rights on disposition of collateral.
30-9-307. Protection of buyers of goods.

9-308. Purchase of chattel paper and nonnegotiable instruments.
9-309. Protection of purchasers of instruments and documents.
9-310. Priority of certain liens arising by operation of law.
9-311. Alienability of debtor's rights — judicial process.
9-312. Priorities among conflicting security interests in the same collateral.
9-313. Priority of security interests in fixtures.
9-314. Accessions.
9-315. Priority when goods are commingled or processed.
9-316. Priority subject to subordination.
9-317. Secured party not obligated on contract of debtor.
9-318. Defenses against assignee — modification of contract after notification of assignment — term prohibiting assignment ineffective — identification and proof of assignment.

Part 4 — Filing

9-401. Place of filing — erroneous filing — removal of collateral.
9-402. Formal requisites of financing statement — amendments.
9-403. What constitutes filing — duration of filing — effect of lapsed filing — duties of filing officer.
9-404. Termination statement.
9-405. Assignment of security interest — duties of filing officer — fees.
9-406. Release of collateral — duties of filing officer — fees.
9-407. Information from filing officer.
9-408. Financing statements of transmitting utilities — definitions.
9-409. Utility financing statement — place of filing — contents — perfection of security interest.
9-410. Continued applicability of laws to transmitting utilities.
9-411. Security agreements and termination statements — when destroyed.

Part 5 — Default

9-501. Default — procedure when security agreement covers both real and personal property.
9-502. Collection rights of secured party.
9-503. Secured party's right to take possession after default.
9-504. Secured party's right to dispose of collateral after default — effect of disposition.
9-505. Compulsory disposition of collateral — acceptance of the collateral as discharge of obligation.
9-506. Debtor's right to redeem collateral.
9-507. Secured party's liability for failure to comply with this part.
9-508. Foreclosure of security interests in personal property.
9-509. Repealed. Sec. 3, Ch. 189, L. 1979.
9-510. Repealed. Sec. 3, Ch. 189, L. 1979.
9-511. Counsel fees on foreclosure.

Part 1

Short Title, Applicability, and Definitions

30-9-101. Short title. This chapter shall be known and may be cited Uniform Commercial Code—Secured Transactions.

listory: **En. Sec. 9-101, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-101.**

30-9-102. Policy and scope of chapter. (1) Except as otherwise pro-led in 30-9-103 on multiple state transactions and in 30-9-104 on excluded transactions, this chapter applies so far as concerns any personal propert and fixtures within the jurisdiction of this state:

(a) to any transaction (regardless of its form) which is intended to creat a security interest in personal property or fixtures including goods, documents, instruments, general intangibles, chattel paper, accounts or contrac rights; and also

(b) to any sale of accounts, contract rights or chattel paper.

(2) This chapter applies to security interests created by contract including pledge, assignment, chattel mortgage, chattel trust, trust deed, factor’ lien, equipment trust, conditional sale, trust receipt, other lien or title retention contract and lease or consignment intended as security. This chapte does not apply to statutory liens except as provided in 30-9-310.

(3) The application of this chapter to a security interest in a secured obligation is not affected by the fact that the obligation is itself secured by a transaction or interest to which this chapter does not apply.

History: En. Sec. 9-102, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-102.

30-9-103. Accounts, contract rights, general intangibles and equipment relating to another jurisdiction; and incoming goods already subject to a security interest. (1) If the office where the assignor of accounts or contract rights keeps his records concerning them is in this state, the validity and perfection of a security interest therein and the possibility and effect of proper filing is governed by this chapter; otherwise by the law (including the conflict of laws rules) of the jurisdiction where such office is located.

(2) If the chief place of business of a debtor is in this state, this chapter governs the validity and perfection of a security interest and the possibility and effect of proper filing with regard to general intangibles or with regard to goods of a type which are normally used in more than one jurisdiction (such as automotive equipment, rolling stock, airplanes, road building equipment, commercial harvesting equipment, construction machinery and the like) if such goods are classified as equipment or classified as inventory by reason of their being leased by the debtor to others. Otherwise, the law (including the conflict of laws rules) of the jurisdiction where such chief place of business is located shall govern. If the chief place of business is located in a jurisdiction which does not provide for perfection of the security interest by filing or recording in that jurisdiction, then the security interest may be perfected by filing in this state.

(3) If personal property other than that governed by subsections (1) and (2) is already subject to a security interest when it is brought into this state, the validity of the security interest in this state is to be determined by the law (including the conflict of laws rules) of the jurisdiction where the property was when the security interest attached. However, if the parties to the transaction understood at the time that the security interest attached that the property would be kept in this state and it was brought into this state within 30 days after the security interest attached for purposes other than transportation through this state, then the validity of the security interest in this state is to be determined by the law of this state. If the security interest was already perfected under the law of the jurisdiction where the property was when the security interest attached and before being brought into this

te, the security interest continues perfected in this state for 4 months and o thereafter if within the 4-month period it is perfected in this state. The urity interest may also be perfected in this state after the expiration of 4-month period; in such case perfection dates from the time of perfection this state. If the security interest was not perfected under the law of the isdiction where the property was when the security interest attached and ore being brought into this state, it may be perfected in this state; in such e perfection dates from the time of perfection in this state.

4) Notwithstanding subsections (2) and (3), if personal property is cov- d by a certificate of title issued under a statute of this state or any other isdiction which requires indication on a certificate of title of any security erest in the property as a condition of perfection, then the perfection is erned by the law of the jurisdiction which issued the certificate.

listory: En. Sec. 9-103, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-103.

30-9-104. Transactions excluded from chapter. This chapter does t apply:

a) to a security interest subject to any statute of the United States such the Ship Mortgage Act, 1920, to the extent that such statute governs the hts of parties to and third parties affected by transactions in particular es of property; or

b) to a landlord's lien; or

c) to a lien given by statute or other rule of law for services or materials ept as provided in 30-9-310 on priority of such liens; or

d) to a transfer of a claim for wages, salary or other compensation of an ployee; or

e) to an equipment trust covering railway rolling stock; or

f) to a sale of accounts, contract rights or chattel paper as part of a sale the business out of which they arose, or an assignment of accounts, con- ct rights or chattel paper which is for the purpose of collection only, or ransfer of a contract right to an assignee who is also to do the perfor- nce under the contract; or

g) to a transfer of an interest or claim in or under any policy of insur- ce; or

h) to a right represented by a judgment; or

i) to any right of setoff; or

j) except to the extent that provision is made for fixtures in 30-9-313, to creation or transfer of an interest in or lien on real estate, including a se or rents thereunder; or

k) to a transfer in whole or in part of any of the following: any claim sing out of tort; any deposit, savings, passbook or like account maintained h a bank, savings and loan association, credit union or like organization.

listory: En. Sec. 9-104, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-104.

30-9-105. Definitions and index of definitions. (1) In this chapter less the context otherwise requires:

a) "Account debtor" means the person who is obligated on an account, attel paper, contract right or general intangible;

(b) "Chattel paper" means a writing or writings which evidence both a monetary obligation and a security interest in or a lease of specific goods When a transaction is evidenced both by such a security agreement or a lease and by an instrument or a series of instruments, the group of writings taken together constitutes chattel paper;

(c) "Collateral" means the property subject to a security interest, and includes accounts, contract rights and chattel paper which have been sold;

(d) "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts, contract rights or chattel paper When the debtor and the owner of the collateral are not the same person the term "debtor" means the owner of the collateral in any provision of the chapter dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires;

(e) "Document" means document of title as defined in 30-1-201(15);

(f) "Goods" includes all things which are movable at the time the security interest attaches or which are fixtures (30-9-313), but does not include money, documents, instruments, accounts, chattel paper, general intangibles, contract rights and other things in action. "Goods" also includes the unborn young of animals and growing crops;

(g) "Instrument" means a negotiable instrument (defined in 30-3-104), or a security (defined in 30-8-102) or any other writing which evidences a right to the payment of money and is not itself a security agreement or lease and is of a type which is in ordinary course of business transferred by delivery with any necessary endorsement or assignment;

(h) "Security agreement" means an agreement which creates or provides for a security interest;

(i) "Secured party" means a lender, seller or other person in whose favor there is a security interest, including a person to whom accounts, contract rights or chattel paper have been sold. When the holders of obligations issued under an indenture of trust, equipment trust agreement or the like are represented by a trustee or other person, the representative is the secured party.

(2) Other definitions applying to this chapter and the sections in which they appear are:

"Account". 30-9-106.
"Consumer goods". 30-9-109(1).
"Contract right". 30-9-106.
"Equipment". 30-9-109(2).
"Farm products". 30-9-109(3).
"General intangibles". 30-9-106.
"Inventory". 30-9-109(4).
"Lien creditor". 30-9-301(3).
"Proceeds". 30-9-306(1).
"Purchase money security interest". 30-9-107.

(3) The following definitions in other chapters apply to this chapter:

"Check". 30-3-104.
"Contract for sale". 30-2-106.
"Holder in due course". 30-3-302.
"Note". 30-3-104.

Sale". 30-2-106.
4) In addition Chapter 1 contains general definitions and principles of
struction and interpretation applicable throughout this chapter.
istory: En. Sec. 9-105, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-105; amd. Sec. 3, Ch. 137, L.

0-9-106. Definitions — "account" — "contract right" — "gen-
l intangibles". "Account" means any right to payment for goods sold
leased or for services rendered which is not evidenced by an instrument
chattel paper. "Contract right" means any right to payment under a con-
t not yet earned by performance and not evidenced by an instrument or
ttel paper. "General intangibles" means any personal property (including
ngs in action) other than goods, accounts, contract rights, chattel paper,
uments and instruments.
istory: En. Sec. 9-106, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-106.

0-9-107. Definitions — "purchase money security interest". A
urity interest is a "purchase money security interest" to the extent that
s:
a) taken or retained by the seller of the collateral to secure all or part
ts price; or
b) taken by a person who by making advances or incurring an obligation
es value to enable the debtor to acquire rights in or the use of collateral
uch value is in fact so used.
istory: En. Sec. 9-107, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-107.

0-9-108. When after-acquired collateral not security for ante-
lent debt. Where a secured party makes an advance, incurs an obli-
ion, releases a perfected security interest, or otherwise gives new value
ch is to be secured in whole or in part by after-acquired property his
urity interest in the after-acquired collateral shall be deemed to be taken
new value and not as security for an antecedent debt if the debtor
uires his rights in such collateral either in the ordinary course of his busi-
s or under a contract of purchase made pursuant to the security agree-
nt within a reasonable time after new value is given.
istory: En. Sec. 9-108, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-108.

0-9-109. Classification of goods — "consumer goods" —
uipment" — "farm products" — "inventory". Goods are:
1) "consumer goods" if they are used or bought for use primarily for per-
al, family or household purposes;
2) "equipment" if they are used or bought for use primarily in business
cluding farming or a profession) or by a debtor who is a nonprofit orga-
ation or a governmental subdivision or agency or if the goods are not
luded in the definitions of inventory, farm products or consumer goods;
3) "farm products" if they are crops or livestock or supplies used or pro-
ced in farming operations or if they are products of crops or livestock in
ir unmanufactured states (such as ginned cotton, wool clip, maple syrup,

milk and eggs), and if they are in the possession of a debtor engaged i raising, fattening, grazing or other farming operations. If goods are far products they are neither equipment nor inventory;

(4) "inventory" if they are held by a person who holds them for sale lease or to be furnished under contracts of service or if he has so furnishe them, or if they are raw materials, work in process or materials used or cor sumed in a business. Inventory of a person is not to be classified as h equipment.

History: **En. Sec. 9-109, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-109.**

30-9-110. Sufficiency of description. For the purposes of this chapter any description of personal property or real estate is sufficient whethe or not it is specific if it reasonably identifies what is described.

History: **En. Sec. 9-110, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-110.**

30-9-111. Applicability of bulk transfer laws. The creation of security interest is not a bulk transfer under Chapter 6.

History: **En. Sec. 9-111, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-111.**

30-9-112. Where collateral is not owned by debtor. Unless otherwise agreed, when a secured party knows that collateral is owned by a perso who is not the debtor, the owner of the collateral is entitled to receive fror the secured party any surplus under 30-9-502(2) or under 30-9-504(1), and i not liable for the debt or for any deficiency after resale, and he has the sam right as the debtor:

(a) to receive statements under 30-9-208;

(b) to receive notice of and to object to a secured party's proposal t retain the collateral in satisfaction of the indebtedness under 30-9-505;

(c) to redeem the collateral under 30-9-506;

(d) to obtain injunctive or other relief under 30-9-507(1); and

(e) to recover losses caused to him under 30-9-208(2).

History: **En. Sec. 9-112, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-112.**

30-9-113. Security interests arising under chapter on sales. security interest arising solely under the chapter on sales (chapter 2) is subject to the provisions of this chapter except that to the extent that and s long as the debtor does not have or does not lawfully obtain possession o the goods:

(a) no security agreement is necessary to make the security interes enforceable; and

(b) no filing is required to perfect the security interest; and

(c) the rights of the secured party on default by the debtor are governe by the chapter on sales (chapter 2).

History: **En. Sec. 9-113, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-113.**

Part 2

Validity of Security Agreement and Rights of Parties Thereto

30-9-201. General validity of security agreement. Except a otherwise provided by this code a security agreement is effective according its terms between the parties, against purchasers of the collateral and ainst creditors. Nothing in this chapter validates any charge or practice egal under any statute or regulation thereunder governing usury, small ans, retail installment sales, or the like, or extends the application of any ch statute or regulation to any transaction not otherwise subject thereto.

History: En. Sec. 9-201, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-201.

30-9-202. Title to collateral immaterial. Each provision of this apter with regard to rights, obligations and remedies applies whether title collateral is in the secured party or in the debtor.

History: En. Sec. 9-202, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-202.

30-9-203. Enforceability of security interest — proceeds, for- al requisites. (1) Subject to the provisions of 30-4-208 on the security terest of a collecting bank and 30-9-113 on a security interest arising under e Chapter on Sales, a security interest is not enforceable against the debtor third parties unless:

(a) the collateral is in the possession of the secured party; or

(b) the debtor has signed a security agreement which contains a descrip- on of the collateral and in addition, when the security interest covers crops oil, gas or minerals to be extracted or timber to be cut, a description of e land concerned. In describing collateral, the word "proceeds" is sufficient ithout further description to cover proceeds of any character.

(2) A transaction although subject to this chapter, is also subject to Title 2, chapter 5, as enacted by Chapter 283, Laws of Montana 1959, to Title 1, chapter 1, part 2, as enacted by Chapter 282, Laws of Montana 1959, and 81-8-301 through 81-8-305, Title 61, chapter 3, and Title 31, chapter 1, art 4, as amended, and in the case of conflict between the provisions of this apter and any such statute, the provisions of such statute control. Failure comply with any applicable statute has only the effect which is specified erein.

History: En. Sec. 9-203, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-203.

30-9-204. When security interest attaches — after-acquired roperty — future advances. (1) A security interest cannot attach until ere is agreement (subsection (3) of 30-1-201) that it attach and value is ven and the debtor has rights in the collateral. It attaches as soon as all the events in the preceding sentence have taken place unless explicit greement postpones the time of attaching.

(2) For the purposes of this section the debtor has no rights:

(a) in crops until they are planted or otherwise become growing crops, in e young of livestock until they are conceived;

(b) in fish until caught, in oil, gas or minerals until they are extracted, timber until it is cut;

(c) in a contract right until the contract has been made;

(d) in an account until it comes into existence.

(3) Except as provided in subsection (4) a security agreement may pro- ide that collateral, whenever acquired, shall secure all obligations covered by e security agreement.

(4) No security interest attaches under an after-acquired property clause

(a) to crops which become such more than 1 year after the security agre ment is executed except that a security interest in crops which is given conjunction with a lease or a land purchase or improvement transaction ev denced by a contract, mortgage or deed of trust may if so agreed attach crops to be grown on the land concerned during the period of such real esta transaction;

(b) to consumer goods other than accessions (30-9-314) when given additional security unless the debtor acquires rights in them within 10 da after the secured party gives value.

(5) Obligations covered by a security agreement may include futu advances or other value whether or not the advances or value are given pu suant to commitment.

History: **En. Sec. 9-204, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-204.**

30-9-205. Use or disposition of collateral without accountin permissible. A security interest is not invalid or fraudulent against cred tors by reason of liberty in the debtor to use, commingle or dispose of all part of the collateral (including returned or repossessed goods) or to colle or compromise accounts, contract rights or chattel paper, or to accept th return of goods or make repossessions, or to use, commingle or dispose proceeds, or by reason of the failure of the secured party to require th debtor to account for proceeds or replace collateral. This section does n relax the requirements of possession where perfection of a security intere depends upon possession of the collateral by the secured party or by a baile

History: **En. Sec. 9-205, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-205.**

30-9-206. Agreement not to assert defenses against assigne — modification of sales warranties where security agreeme exists. (1) Subject to any statute or decision which establishes a differen rule for buyers or lessees of consumer goods, an agreement by a buyer o lessee that he will not assert against an assignee any claim or defense whic he may have against the seller or lessor is enforceable by an assignee wh takes his assignment for value, in good faith and without notice of a clai or defense, except as to defenses of a type which may be asserted against holder in due course of a negotiable instrument under the Chapter on Com mercial Paper (Chapter 3). A buyer who as part of one transaction signs bot a negotiable instrument and a security agreement makes such an agreement.

(2) When a seller retains a purchase money security interest in goods th Chapter on Sales (Chapter 2) governs the sale and any disclaimer, limitatio or modification of the seller's warranties.

History: **En. Sec. 9-206, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-206.**

30-9-207. Rights and duties when collateral is in secure party's possession. (1) A secured party must use reasonable care in th custody and preservation of collateral in his possession. In the case of a instrument or chattel paper reasonable care includes taking necessary step to preserve rights against prior parties unless otherwise agreed.

(2) Unless otherwise agreed, when collateral is in the secured party's pos session:

(a) reasonable expenses (including the cost of any insurance and payment f taxes or other charges) incurred in the custody, preservation, use or operaion of the collateral are chargeable to the debtor and are secured by the colateral;

(b) the risk of accidental loss or damage is on the debtor to the extent f any deficiency in any effective insurance coverage;

(c) the secured party may hold as additional security any increase or rofits (except money) received from the collateral, but money so received, nless remitted to the debtor, shall be applied in reduction of the secured bligation;

(d) the secured party must keep the collateral identifiable but fungible ollateral may be commingled;

(e) the secured party may repledge the collateral upon terms which do ot impair the debtor's right to redeem it.

(3) A secured party is liable for any loss caused by his failure to meet any bligation imposed by the preceding subsections but does not lose his securty interest.

(4) A secured party may use or operate the collateral for the purpose of reserving the collateral or its value or pursuant to the order of a court of ppropriate jurisdiction or, except in the case of consumer goods, in the maner and to the extent provided in the security agreement.

History: En. Sec. 9-207, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-207.

30-9-208. Request for statement of account or list of collateral. 1) A debtor may sign a statement indicating what he believes to be the ggregate amount of unpaid indebtedness as of a specified date and may end it to the secured party with a request that the statement be approved r corrected and returned to the debtor. When the security agreement or any ther record kept by the secured party identifies the collateral a debtor may imilarly request the secured party to approve or correct a list of the collatral.

(2) The secured party must comply with such a request within 2 weeks fter receipt by sending a written correction or approval. If the secured party laims a security interest in all of a particular type of collateral owned by he debtor he may indicate that fact in his reply and need not approve or orrect an itemized list of such collateral. If the secured party without easonable excuse fails to comply he is liable for any loss caused to the lebtor thereby; and if the debtor has properly included in his request a good aith statement of the obligation or a list of the collateral or both the secured arty may claim a security interest only as shown in the statement against ersons misled by his failure to comply. If he no longer has an interest in he obligation or collateral at the time the request is received he must dislose the name and address of any successor in interest known to him and e is liable for any loss caused to the debtor as a result of failure to disclose. successor in interest is not subject to this section until a request is received y him.

(3) A debtor is entitled to such a statement once every 6 months withou charge. The secured party may require payment of a charge not exceedin $10 for each additional statement furnished.

History: En. Sec. 9-208, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-208.

Part 3

Rights of Third Parties — Perfected and Unperfected Security Interests — Rules of Priority

30-9-301. Persons who take priority over unperfected security interests — "lien creditor". (1) Except as otherwise provided in subsection (2), an unperfected security interest is subordinate to the rights of:

(a) persons entitled to priority under 30-9-312;

(b) a person who becomes a lien creditor without knowledge of the security interest and before it is perfected;

(c) in the case of goods, instruments, documents, and chattel paper, a person who is not a secured party and who is a transferee in bulk or other buyer not in ordinary course of business to the extent that he gives value and receives delivery of the collateral without knowledge of the security interest and before it is perfected;

(d) in the case of accounts, contract rights, and general intangibles, a person who is not a secured party and who is a transferee to the extent that he gives value without knowledge of the security interest and before it is perfected.

(2) If the secured party files with respect to a purchase money security interest before or within 20 days after the collateral comes into possession of the debtor, he takes priority over the rights of a transferee in bulk or of a lien creditor which arise between the time the security interest attaches and the time of filing.

(3) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment. Unless all the creditors represented had knowledge of the security interest such a representative of creditors is a lien creditor without knowledge even though he personally has knowledge of the security interest.

History: En. Sec. 9-301, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-301; amd. Sec. 1, Ch. 406, L. 1979.

30-9-302. When filing is required to perfect security interest — security interests to which filing provisions of this chapter do not apply. (1) A financing statement must be filed to perfect all security interests except the following:

(a) a security interest in collateral in possession of the secured party under 30-9-305;

(b) a security interest temporarily perfected in instruments or documents without delivery under 30-9-304 or in proceeds for a 10-day period under 30-9-306;

(c) a purchase money security interest in farm equipment having a pur- ase price not in excess of $2,500; but filing is required for a fixture under)-9-313 or for a motor vehicle required to be licensed;

(d) a purchase money security interest in consumer goods; but filing is quired for a fixture under 30-9-313 or for a motor vehicle required to be censed;

(e) an assignment of accounts or contract rights which does not alone or conjunction with other assignments to the same assignee transfer a signifi- nt part of the outstanding accounts or contract rights of the assignor;

(f) a security interest of a collecting bank (30-4-208) or arising under the hapter on Sales or covered in subsection (3) of this section.

(2) If a secured party assigns a perfected security interest, no filing under is chapter is required in order to continue the perfected status of the curity interest against creditors of and transferees from the original debtor.

(3) Except for financing statements filed pursuant to 30-9-409, the filing rovisions of this chapter do not apply to a security interest in property sub- ct to a statute:

(a) of the United States which provides for a national registration or ling of all security interests in such property; or

(b) of this state which provides for central filing of, or which requires dication on a certificate of title of, such security interests in such property.

(4) Except for financing statements filed pursuant to 30-9-409, a security terest in property covered by a statute described in subsection (3) can be erfected only by registration or filing under that statute or by indication of e security interest on a certificate of title or a duplicate thereof by a public fficial.

History: **En. Sec. 9-302, Ch. 264, L. 1963; amd. Sec. 13, Ch. 265, L. 1977; R.C.M. 1947, 7A-9-302.**

30-9-303. When security interest is perfected — continuity of erfection. (1) A security interest is perfected when it has attached and hen all of the applicable steps required for perfection have been taken. uch steps are specified in 30-9-302, 30-9-304, 30-9-305 and 30-9-306. If such teps are taken before the security interest attaches, it is perfected at the me when it attaches.

(2) If a security interest is originally perfected in any way permitted nder this chapter and is subsequently perfected in some other way under his chapter, without an intermediate period when it was unperfected, the ecurity interest shall be deemed to be perfected continuously for the pur- oses of this chapter.

History: **En. Sec. 9-303, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-303.**

30-9-304. Perfection of security interest in instruments, docu- nents and goods covered by documents — perfection by permis- ive filing — temporary perfection without filing or transfer of ossession. (1) A security interest in chattel paper or negotiable documents nay be perfected by filing. A security interest in instruments (other than nstruments which constitute part of chattel paper) can be perfected only by

the secured party's taking possession, except as provided in subsections (
and (5).

(2) During the period that goods are in the possession of the issuer of
negotiable document therefor, a security interest in the goods is perfected
perfecting a security interest in the document, and any security interest
the goods otherwise perfected during such period is subject thereto.

(3) A security interest in goods in the possession of a bailee other th
one who has issued a negotiable document therefor is perfected by issuan
of a document in the name of the secured party or by the bailee's recei
of notification of the secured party's interest or by filing as to the goods.

(4) A security interest in instruments or negotiable documents is pe
fected without filing or the taking of possession for a period of 21 days fro
the time it attaches to the extent that it arises for new value given under
written security agreement.

(5) A security interest remains perfected for a period of 21 days witho
filing where a secured party having a perfected security interest in an instr
ment, a negotiable document or goods in possession of a bailee other tha
one who has issued a negotiable document therefor:

(a) makes available to the debtor the goods or documents representir
the goods for the purpose of ultimate sale or exchange or for the purpose
loading, unloading, storing, shipping, transshipping, manufacturing, proces
ing or otherwise dealing with them in a manner preliminary to their sale
exchange; or

(b) delivers the instrument to the debtor for the purpose of ultimate sa
or exchange or of presentation, collection, renewal or registration of transfer.

(6) After the 21-day period in subsections (4) and (5) perfection depend
upon compliance with applicable provisions of this chapter.

History: **En. Sec. 9-304, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-304.**

**30-9-305. When possession by secured party perfects securit
interest without filing.** A security interest in letters of credit and advice
of credit (subsection (2)(a) of 30-5-116), goods, instruments, negotiable docu
ments or chattel paper may be perfected by the secured party's taking pos
session of the collateral. If such collateral other than goods covered by
negotiable document is held by a bailee, the secured party is deemed to hav
possession from the time the bailee receives notification of the secure
party's interest. A security interest is perfected by possession from the tim
possession is taken without relation back and continues only so long as pos
session is retained, unless otherwise specified in this chapter. The securit
interest may be otherwise perfected as provided in this chapter before o
after the period of possession by the secured party.

History: **En. Sec. 9-305, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-305.**

**30-9-306. "Proceeds" — secured party's rights on disposition o
collateral.** (1) "Proceeds" includes whatever is received when collateral o
proceeds is sold, exchanged, collected or otherwise disposed of. The term als
includes the account arising when the right to payment is earned under
contract right. Money, checks and the like are "cash proceeds". All other pro
ceeds are "noncash proceeds".

(2) Except where this chapter otherwise provides, a security interest con
tinues in collateral notwithstanding sale, exchange or other dispositio

hereof by the debtor unless his action was authorized by the secured party n the security agreement or otherwise, and also continues in any identifiable proceeds including collections received by the debtor.

(3) The security interest in proceeds is a continuously perfected security nterest if the interest in the original collateral was perfected but it ceases o be a perfected security interest and becomes unperfected 10 days after eceipt of the proceeds by the debtor unless:

(a) a filed financing statement covering the original collateral also covers proceeds; or

(b) the security interest in the proceeds is perfected before the expiration of the 10-day period.

(4) In the event of insolvency proceedings instituted by or against a debtor, a secured party with a perfected security interest in proceeds has a perfected security interest:

(a) in identifiable noncash proceeds;

(b) in identifiable cash proceeds in the form of money which is not commingled with other money or deposited in a bank account prior to the insolvency proceedings;

(c) in identifiable cash proceeds in the form of checks and the like which are not deposited in a bank account prior to the insolvency proceedings; and

(d) in all cash and bank accounts of the debtor, if other cash proceeds have been commingled or deposited in a bank account, but the perfected security interest under this paragraph (d) is:

(i) subject to any right of setoff; and

(ii) limited to an amount not greater than the amount of any cash proceeds received by the debtor within 10 days before the institution of the insolvency proceedings and commingled or deposited in a bank account prior to the insolvency proceedings less the amount of cash proceeds received by the debtor and paid over to the secured party during the 10-day period.

(5) If a sale of goods results in an account or chattel paper which is transferred by the seller to a secured party, and if the goods are returned to or are repossessed by the seller or the secured party, the following rules determine priorities:

(a) If the goods were collateral at the time of sale for an indebtedness of the seller which is still unpaid, the original security interest attaches again to the goods and continues as a perfected security interest if it was perfected at the time when the goods were sold. If the security interest was originally perfected by a filing which is still effective, nothing further is required to continue the perfected status; in any other case, the secured party must take possession of the returned or repossessed goods or must file.

(b) An unpaid transferee of the chattel paper has a security interest in the goods against the transferor. Such security interest is prior to a security interest asserted under paragraph (a) to the extent that the transferee of the chattel paper was entitled to priority under 30-9-308.

(c) An unpaid transferee of the account has a security interest in the goods against the transferor. Such security interest is subordinate to a security interest asserted under paragraph (a).

(d) A security interest of an unpaid transferee asserted under paragrap (b) or (c) must be perfected for protection against creditors of the transfere and purchasers of the returned or repossessed goods.

History: En. Sec. 9-306, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-306.

30-9-307. Protection of buyers of goods. (1) A buyer in ordinar course of business (subsection (9) of 30-1-201) other than a person buyin farm products from a person engaged in farming operations takes free of security interest created by his seller even though the security interest is pe fected and even though the buyer knows of its existence.

(2) In the case of consumer goods and in the case of farm equipment having an original purchase price not in excess of $2,500 (other than fixtures, se 30-9-313), a buyer takes free of a security interest even though perfected i he buys without knowledge of the security interest, for value and for his ow personal, family or household purposes or his own farming operations unles prior to the purchase the secured party has filed a financing statement covering such goods.

History: En. Sec. 9-307, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-307.

30-9-308. Purchase of chattel paper and nonnegotiable instruments. A purchaser of chattel paper or a nonnegotiable instrument wh gives new value and takes possession of it in the ordinary course of his business and without knowledge that the specific paper or instrument is subjec to a security interest has priority over a security interest which is perfecte under 30-9-304 (permissive filing and temporary perfection). A purchaser o chattel paper who gives new value and takes possession of it in the ordinar course of his business has priority over a security interest in chattel pape which is claimed merely as proceeds of inventory subject to a security interest (30-9-306), even though he knows that the specific paper is subject to th security interest.

History: En. Sec. 9-308, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-308.

30-9-309. Protection of purchasers of instruments and documents. Nothing in this chapter limits the rights of a holder in due cours of a negotiable instrument (30-3-302) or a holder to whom a negotiable document of title has been duly negotiated (30-7-501) or a bona fide purchase of a security (30-8-301) and such holders or purchasers take priority over a earlier security interest even though perfected. Filing under this chapter does not constitute notice of the security interest to such holders or purchasers.

History: En. Sec. 9-309, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-309.

30-9-310. Priority of certain liens arising by operation of law. When a person in the ordinary course of his business furnishes services or materials with respect to goods subject to a security interest, a lien upon goods in the possession of such person given by statute or rule of law for such materials or services takes priority over a perfected security interest unless the lien is statutory and the statute expressly provides otherwise.

History: En. Sec. 9-310, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-310.

30-9-311. Alienability of debtor's rights — judicial process. The debtor's rights in collateral may be voluntarily or involuntarily transferred

y way of sale, creation of a security interest, attachment, levy, garnishment
other judicial process) notwithstanding a provision in the security agree-
ent prohibiting any transfer or making the transfer constitute a default.
History: En. Sec. 9-311, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-311.

**30-9-312. Priorities among conflicting security interests in the
ame collateral.** (1) The rules of priority stated in the following sections
iall govern where applicable: 30-4-208 with respect to the security interest
collecting banks in items being collected, accompanying documents and
oceeds; 30-9-301 on certain priorities; 30-9-304 on goods covered by docu-
ents; 30-9-306 on proceeds and repossessions; 30-9-307 on buyers of goods;
)-9-308 on possessory against nonpossessory interests in chattel paper or
onnegotiable instruments; 30-9-309 on security interests in negotiable
struments, documents or securities; 30-9-310 on priorities between per-
cted security interests and liens by operation of law; 30-9-313 on security
terests in fixtures as against interests in real estate; 30-9-314 on security
terests in accessions as against interest in goods; 30-9-315 on conflicting
curity interests where goods lose their identity or become part of a product;
ıd 30-9-316 on contractual subordination.

(2) A perfected security interest in crops for new value given to enable
ıe debtor to produce the crops during the production season and given not
ore than 3 months before the crops become growing crops by planting or
herwise takes priority over an earlier perfected security interest to the
tent that such earlier interest secures obligations due more than 6 months
efore the crops become growing crops by planting or otherwise, even though
ıe person giving new value had knowledge of the earlier security interest.

(3) A purchase money security interest in inventory collateral has priority
ver a conflicting security interest in the same collateral if:

(a) the purchase money security interest is perfected at the time the
ebtor receives possession of the collateral; and

(b) any secured party whose security interest is known to the holder of
ıe purchase money security interest or who, prior to the date of the filing
ade by the holder of the purchase money security interest, had filed a
nancing statement covering the same items or type of inventory, has
ceived notification of the purchase money security interest before the
ebtor receives possession of the collateral covered by the purchase money
curity interest; and

(c) such notification states that the person giving the notice has or
pects to acquire a purchase money security interest in inventory of the
ebtor, describing such inventory by item or type.

(4) A purchase money security interest in collateral other than inventory
as priority over a conflicting security interest in the same collateral if the
urchase money security interest is perfected at the time the debtor receives
ossession of the collateral or within 20 days thereafter.

(5) In all cases not governed by other rules stated in this section (includ-
ıg cases of purchase money security interests which do not qualify for the
ecial priorities set forth in subsections (3) and (4) of this section), priority

between conflicting security interests in the same collateral shall be determined as follows:

(a) in the order of filing if both are perfected by filing, regardless of which security interest attached first under 30-9-204(1) and whether it attached before or after filing;

(b) in the order of perfection unless both are perfected by filing, regardless of which security interest attached first under 30-9-204(1) and, in the case of a filed security interest, whether it attached before or after filing; and

(c) in the order of attachment under 30-9-204(1) so long as neither is perfected.

(6) For the purpose of the priority rules of the immediately preceding subsection, a continuously perfected security interest shall be treated at all times as if perfected by filing if it was originally so perfected and it shall be treated at all times as if perfected otherwise than by filing if it was originally perfected otherwise than by filing.

History: En. Sec. 9-312, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-312; amd. Sec. 2, Ch. 406, L. 1979.

30-9-313. Priority of security interests in fixtures. (1) The rules of this section do not apply to goods incorporated into a structure in the manner of lumber, bricks, tile, cement, glass, metalwork and the like and no security interest in them exists under this chapter unless the structure remains personal property under applicable law. The law of this state other than this code determines whether and when other goods become fixtures. This code does not prevent creation of an encumbrance upon fixtures or real estate pursuant to the law applicable to real estate.

(2) A security interest which attaches to goods before they become fixtures takes priority as to the goods over the claims of all persons who have an interest in the real estate except as stated in subsection (4).

(3) A security interest which attaches to goods after they become fixtures is valid against all persons subsequently acquiring interests in the real estate except as stated in subsection (4) but is invalid against any person with an interest in the real estate at the time the security interest attaches to the goods who has not in writing consented to the security interest or disclaimed an interest in the goods as fixtures.

(4) The security interests described in subsections (2) and (3) do not take priority over:

(a) a subsequent purchaser for value of any interest in the real estate; or

(b) a creditor with a lien on the real estate subsequently obtained by judicial proceedings; or

(c) a creditor with a prior encumbrance of record on the real estate to the extent that he makes subsequent advances

if the subsequent purchase is made, the lien by judicial proceedings is obtained, or the subsequent advance under the prior encumbrance is made or contracted for without knowledge of the security interest and before it is perfected. A purchaser of the real estate at a foreclosure sale other than an encumbrancer purchasing at his own foreclosure sale is a subsequent purchaser within this section.

(5) When under subsections (2) or (3) and (4) a secured party has priority over the claims of all persons who have interests in the real estate, he may,

default, subject to the provisions of Part 5, remove his collateral from the l estate but he must reimburse any encumbrancer or owner of the real ate who is not the debtor and who has not otherwise agreed for the cost repair of any physical injury, but not for any diminution in value of the l estate caused by the absence of the goods removed or by any necessity replacing them. A person entitled to reimbursement may refuse permis- to remove until the secured party gives adequate security for the perfor- nce of this obligation.

istory: **En. Sec. 9-313, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-313.**

0-9-314. Accessions. (1) A security interest in goods which attaches ore they are installed in or affixed to other goods takes priority as to the ds installed or affixed (called in this section "accessions") over the claims all persons to the whole except as stated in subsection (3) and subject to 9-315(1).

2) A security interest which attaches to goods after they become part of vhole is valid against all persons subsequently acquiring interests in the ole except as stated in subsection (3) but is invalid against any person h an interest in the whole at the time the security interest attaches to the ds who has not in writing consented to the security interest or disclaimed interest in the goods as part of the whole.

3) The security interests described in subsections (1) and (2) do not take ority over:

a) a subsequent purchaser for value of any interest in the whole; or

b) a creditor with a lien on the whole subsequently obtained by judicial ceedings; or

c) a creditor with a prior perfected security interest in the whole to the ent that he makes subsequent advances

f the subsequent purchase is made, the lien by judicial proceedings ained or the subsequent advance under the prior perfected security erest is made or contracted for without knowledge of the security interest d before it is perfected. A purchaser of the whole at a foreclosure sale other n the holder of a perfected security interest purchasing at his own eclosure sale is a subsequent purchaser within this section.

4) When under subsection (1) or (2) and (3) a secured party has an erest in accessions which has priority over the claims of all persons who ve interests in the whole, he may on default subject to the provisions of rt 5 remove his collateral from the whole but he must reimburse any cumbrancer or owner of the whole who is not the debtor and who has not erwise agreed for the cost of repair of any physical injury but not for any ninution in value of the whole caused by the absence of the goods removed by any necessity for replacing them. A person entitled to reimbursement y refuse permission to remove until the secured party gives adequate urity for the performance of this obligation.

listory: **En. Sec. 9-314, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-314.**

0-9-315. Priority when goods are commingled or processed. If a security interest in goods was perfected and subsequently the goods or a part thereof have become part of a product or mass, the security interes continues in the product or mass if:

(a) the goods are so manufactured, processed, assembled or commingle that their identity is lost in the product or mass; or

(b) a financing statement covering the original goods also covers th product into which the goods have been manufactured, processed or assem bled. In a case to which paragraph (b) applies, no separate security interes in that part of the original goods which has been manufactured, processed c assembled into the product may be claimed under 30-9-314.

(2) When under subsection (1) more than one security interest attache to the product or mass, they rank equally according to the ratio that the cos of the goods to which each interest originally attached bears to the cost c the total product or mass.

History: **En. Sec. 9-315, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-315.**

30-9-316. Priority subject to subordination. Nothing in this chap ter prevents subordination by agreement by any person entitled to priority.

History: **En. Sec. 9-316, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-316.**

30-9-317. Secured party not obligated on contract of debto The mere existence of a security interest or authority given to the debtor t dispose of or use collateral does not impose contract or tort liability upon th secured party for the debtor's acts or omissions.

History: **En. Sec. 9-317, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-317.**

30-9-318. Defenses against assignee — modification of con tract after notification of assignment — term prohibiting assign ment ineffective — identification and proof of assignment. (1 Unless an account debtor has made an enforceable agreement not to asser defenses or claims arising out of a sale as provided in 30-9-206 the rights o an assignee are subject to:

(a) all the terms of the contract between the account debtor and assigno and any defense or claim arising therefrom; and

(b) any other defense or claim of the account debtor against the assigno which accrues before the account debtor receives notification of the assign ment.

(2) So far as the right to payment under an assigned contract right ha not already become an account, and notwithstanding notification of th assignment, any modification of or substitution for the contract made in goo faith and in accordance with reasonable commercial standards is effectiv against an assignee unless the account debtor has otherwise agreed but th assignee acquires corresponding rights under the modified or substituted con tract. The assignment may provide that such modification or substitution i a breach by the assignor.

(3) The account debtor is authorized to pay the assignor until the accoun debtor receives notification that the account has been assigned and that payment is to be made to the assignee. A notification which does not reasonabl identify the rights assigned is ineffective. If requested by the account debtor the assignee must seasonably furnish reasonable proof that the assignmen has been made and unless he does so the account debtor may pay th assignor.

(4) A term in any contract between an account debtor and an assignor ich prohibits assignment of an account or contract right to which they are rties is ineffective.

History: En. Sec. 9-318, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-318.

Part 4

Filing

30-9-401. Place of filing — erroneous filing — removal of collateral. (1) Except for financing statements filed pursuant to 30-9-409, the oper place to file in order to perfect a security interest is as follows:

(a) when the collateral is equipment used in farming operations, or farm oducts, or accounts, contract rights, or general intangibles arising from or lating to the sale of farm products by a farmer, or consumer goods, then the office of the county clerk and recorder in the county of the debtor's sidence or if the debtor is not a resident of this state then in the office of e county clerk and recorder in the county where the goods are kept, and addition when the collateral is crops in the office of the county clerk and corder in the county where the land on which the crops are growing or to grown is located;

(b) when the collateral is goods which at the time the security interest taches are or are to become fixtures, then in the office where a mortgage the real estate concerned would be filed or recorded;

(c) in all other cases, in the office of the secretary of state.

(2) A filing which is made in good faith in an improper place or not in l of the places required by this section is nevertheless effective with regard any collateral as to which the filing complied with the requirements of this apter and is also effective with regard to collateral covered by the financ-g statement against any person who has knowledge of the contents of such nancing statement.

(3) A filing which is made in the proper place in this state continues fective even though the debtor's residence or place of business or the loca-on of the collateral or its use, whichever controlled the original filing, is ereafter changed.

(4) If collateral is brought into this state from another jurisdiction, the les stated in 30-9-103 determine whether filing is necessary in this state.

History: En. Sec. 9-401, Ch. 264, L. 1963; amd. Sec. 15, Ch. 265, L. 1977; R.C.M. 1947, A-9-401.

30-9-402. Formal requisites of financing statement — amend-ents. (1) A financing statement is sufficient if it is signed by the debtor d the secured party, gives an address of the secured party from which formation concerning the security interest may be obtained, gives a mailing ddress of the debtor and contains a statement indicating the types, or escribing the items, of collateral. A financing statement may be filed before security agreement is made or a security interest otherwise attaches. Except for financing statements filed pursuant to 30-9-409 when the financing statement covers crops growing or to be grown or goods which are or are t become fixtures, the statement must also contain a description of the rea estate concerned and the name of the record owner or record lessee thereo A copy of the security agreement is sufficient as a financing statement if contains the above information and is signed by both parties.

(2) A financing statement which otherwise complies with subsection (1) i sufficient although it is signed only by the secured party when it is filed t perfect a security interest in:

(a) collateral already subject to a security interest in another jurisdictio when it is brought into this state. Such a financing statement must state tha the collateral was brought into this state under such circumstances.

(b) proceeds under 30-9-306 if the security interest in the original collateral was perfected. Such a financing statement must describe the original collateral.

(3) A form substantially as follows is sufficient to comply with subsectio (1):

Name of debtor (or assignor)....
Address ....
Name of secured party (or assignee)....
Address ....
Name of record owner or record lessee ....
Address ....

1. This financing statement covers the following types (or items) of property:
(Describe)....

2. (If collateral is crops) The above described crops are growing or are t be grown on:
(Describe Real Estate)....

3. (If collateral is goods which are or are to become fixtures) The above described goods are affixed or to be affixed to:
(Describe Real Estate)....

4. (If proceeds or products of collateral are claimed) Proceeds— Products of the collateral are also covered.

Signature of Debtor (or Assignor)....
Signature of Secured Party (or Assignee)....

(4) The term "financing statement" as used in this chapter means the original financing statement and any amendments but if any amendment adds collateral, it is effective as to the added collateral only from the filing date of the amendment.

(5) A financing statement substantially complying with the requirements of this section is effective even though it contains minor errors which are not seriously misleading.

History: En. Sec. 9-402, Ch. 264, L. 1963; amd. Sec. 1, Ch. 272, L. 1967; R.C.M. 1947, 87A-9-402.

30-9-403. What constitutes filing — duration of filing — effect of lapsed filing — duties of filing officer. (1) Presentation for filing of a financing statement and tender of the filing fee or acceptance of the statement by the filing officer constitutes filing under this chapter.

2) A filed financing statement which states a maturity date of the obli-
ion secured of 5 years or less is effective until such maturity date and
reafter for a period of 60 days. Any other filed financing statement is
ective for a period of 5 years from the date of filing. The effectiveness of
iled financing statement lapses on the expiration of such 60-day period
er a stated maturity date or on the expiration of such 5-year period, as
case may be, unless a continuation statement is filed prior to the lapse.
on such lapse the security interest becomes unperfected. A filed financing
tement which states that the obligation secured is payable on demand is
ective for 5 years from the date of filing.

3) A continuation statement may be filed by the secured party (i) within
nonths before and 60 days after a stated maturity date of 5 years or less,
l (ii) otherwise within 6 months prior to the expiration of the 5-year
iod specified in subsection (2). Any such continuation statement must be
ned by the secured party, identify the original statement by file number
l state that the original statement is still effective. Upon timely filing of
continuation statement, the effectiveness of the original statement is con-
ued for 5 years after the last date to which the filing was effective where-
on it lapses in the same manner as provided in subsection (2) unless
other continuation statement is filed prior to such lapse. Succeeding con-
uation statements may be filed in the same manner to continue the effec-
eness of the original statement. Unless a statute on disposition of public
ords provides otherwise, the filing officer may remove a lapsed statement
m the files and destroy it.

4) A filing officer shall mark each statement with a consecutive file
mber and with the date and hour of filing and shall hold the statement
public inspection. In addition the filing officer shall index the statements
ording to the name of the debtor and shall note in the index the file
mber and the address of the debtor given in the statement.

5) Except financing statements filed pursuant to 30-9-409, if the instru-
nt covers crops growing or to be grown or goods which are, or are to
come fixtures, or timber, said instrument shall be indexed in accordance
h the requirements applicable to the recording of mortgages of real estate
der the laws of this state. For the purpose of such indexing, each of the
otor (or assignor) and the record owner or record lessee of any real estate
scribed in the financing statement shall be considered a mortgagor with
pect to the financing statement and the secured party (or assignee) shall
considered a mortgagee with respect to the financing statement.

6) If the collateral is equipment or rolling stock of railroads or street
lways, the fee for filing, indexing, and furnishing filing data for an original
a continuation statement shall be $15. In all other cases the uniform fee
filing, indexing and furnishing filing data for an original or a continuation
tement shall be $2.

listory: En. Sec. 9-403, Ch. 264, L. 1963; amd. Sec. 2, Ch. 272, L. 1967; amd. Sec. 4, Ch. 185,
1971; R.C.M. 1947, 87A-9-403.

30-9-404. Termination statement. (1) Whenever there is no out-
nding secured obligation and no commitment to make advances, incur

obligations or otherwise give value, the secured party must on writt demand by the debtor send the debtor a statement that he no longer clai a security interest under the financing statement, which shall be identifi by file number, and by document number, as the case may be. A terminati statement signed by a person other than the secured party of record mu include or be accompanied by the assignment or a statement by the secur party of record that he has assigned the security interest to the signer of t termination statement. The uniform fee for filing and indexing such assignment or statement thereof shall be $2. If the affected secured par fails to send such a termination statement within 10 days after prop demand therefor he shall be liable to the debtor for $100, and in additi for any loss caused to the debtor by such failure.

(2) On presentation to the filing officer of such a termination stateme he must note it in the index. The filing officer shall remove from the file mark "terminated" and send or deliver to the secured party the financi statement and any continuation statement, statement of assignment or stat ment of release pertaining thereto. If the original financing statement or a continuation statement has been indexed in the records relating to real esta mortgages, the termination statement must be indexed in accordance wit the requirements applicable to releases of real estate mortgages.

(3) If the collateral is equipment or rolling stock of railroads or stre railways, the fee for filing and indexing a termination statement includi sending or delivering the financing statement shall be $15. In all other cas the uniform fee for filing and indexing a termination statement includi sending or delivering the financing statement shall be $2.

History: **En. Sec. 9-404, Ch. 264, L. 1963; amd. Sec. 3, Ch. 272, L. 1967; amd. Sec. 5, Ch. 18 L. 1971; R.C.M. 1947, 87A-9-404.**

30-9-405. Assignment of security interest — duties of filin officer — fees. (1) A financing statement may disclose an assignment of security interest in the collateral described in the statement by indication i the statement of the name and address of the assignee or by an assignmen itself or a copy thereof on the face or back of the statement. Either the original secured party or the assignee may sign this statement as the secure party. On presentation to the filing officer of such a financing statement th filing officer shall mark the same as provided in 30-9-403(4). If the collatera is equipment or rolling stock of railroads or street railways, the fee for filing indexing, and furnishing filing data for a financing statement so indicatin an assignment shall be $15. In all other cases the uniform fee for filing indexing, and furnishing filing data for a financing statement so indicatin an assignment shall be $2.

(2) A secured party may assign of record all or a part of his rights unde a financing statement by the filing of a separate written statement of assignment signed by the secured party of record and setting forth the name of th secured party of record and the debtor, the file number and the date of filin of the financing statement, the name and address of the assignee, and excep as provided in 30-9-409(2), a description of the collateral assigned. A copy o the assignment is sufficient as a separate statement if it complies with th preceding sentence. On presentation to the filing officer of such a separat statement, the filing officer shall mark such separate statement with the dat

d hour of the filing. He shall note the assignment on the index of the ıancing statement. If the original financing statement or any continuation ıtement has been indexed in the records relating to real estate mortgages, e statement of assignment must contain a reference to the document ımber of such original or continuation statement and must be indexed in cordance with the requirements applicable to assignments of mortgages. If e collateral is equipment or rolling stock of railroads or street railways, the ː for filing, indexing, and furnishing filing data about such a separate state- ent of assignment shall be $15. In all other cases the uniform fee for filing, dexing, and furnishing filing data about such a separate statement of signment shall be $2.

(3) After the disclosure or filing of an assignment under this section, the signee is the secured party of record.

History: En. Sec. 9-405, Ch. 264, L. 1963; amd. Sec. 4, Ch. 272, L. 1967; amd. Sec. 6, Ch. 185, 1971; amd. Sec. 16, Ch. 265, L. 1977; R.C.M. 1947, 87A-9-405.

30-9-406. Release of collateral — duties of filing officer — fees. secured party of record may by his signed statement release all or a part any collateral described in a filed financing statement. The statement of lease is sufficient if it contains a description of the collateral being released xcept as provided in 30-9-409(2)), the name and address of the debtor, the ıme and address of the secured party, and the file number of the financing atement. Upon presentation of such a statement to the filing officer he ıall mark the statement with the hour and date of filing and shall note the ıme upon the margin of the index of the filing of the financing statement. the original financing statement or any continuation statement has been dexed in the records relating to real estate mortgages, the statement of lease must contain a reference to the document number of such original or ntinuation statement, and must be indexed in accordance with the require- ent applicable to release of mortgages. If the collateral is equipment or lling stock of railroads or street railways, the fee for filing and noting such statement of release shall be $15. In all other cases the uniform fee for ing and noting such a statement of release shall be $2.

History: En. Sec. 9-406, Ch. 264, L. 1963; amd. Sec. 5, Ch. 272, L. 1967; amd. Sec. 7, Ch. 185, 1971; amd. Sec. 17, Ch. 265, L. 1977; R.C.M. 1947, 87A-9-406.

30-9-407. Information from filing officer. (1) If the person filing ıy financing statement, termination statement, statement of assignment, or atement of release, furnishes the filing officer a copy thereof, the filing offi- r shall upon request note upon the copy the file number and date and hour the filing of the original and deliver or send the copy to such person.

(2) Upon request of any person, the filing officer shall issue his certificate ıowing whether there is on file on the date and hour stated therein, any esently effective financing statement naming a particular debtor and any atement of assignment thereof and if there is, giving the date and hour of ing of each such statement and the name and addresses of each secured ırty therein. The uniform fee for such a certificate shall be $3. Upon

request the filing officer shall furnish a copy of any filed financing statemen or statement of assignment for a uniform fee of 50 cents per page.

History: En. Sec. 9-407, Ch. 264, L. 1963; amd. Sec. 8, Ch. 185, L. 1971; R.C.M. 194 87A-9-407.

30-9-408. Financing statements of transmitting utilities — definitions. As used in 30-9-408 through 30-9-410, "transmitting utility" means

(1) any corporation or other business entity primarily engaged, pursuar to rights or franchises issued by and subject to the jurisdiction of a state c federal regulatory body, in the railroad or street railway business, the telephone or telegraph business, the transmission of oil, gas or petroleum products by pipeline, or the transmission or the production and transmission c electricity, steam, gas or water; and

(2) any other corporation primarily engaged in the production, transmission or distribution of electricity, or the furnishing of telephone servic whether or not such corporation is subject to the jurisdiction of a state c federal regulatory body.

History: En. Sec. 1, Ch. 76, L. 1965; amd. Sec. 1, Ch. 279, L. 1967; R.C.M. 1947, 87A-9-302.1(a).

30-9-409. Utility financing statement — place of filing — contents — perfection of security interest. (1) If filing is required unde the Uniform Commercial Code, the proper place to file in order to perfec a security interest in personal property or fixtures of a transmitting utilit or other corporation covered hereby is in the office of the secretary of state.

(2) When the financing statement covers goods of a transmitting utilit which are or are to become fixtures, no description of the real estate concerned is required.

(3) A security interest in rolling stock of a transmitting utility may b perfected either as provided in section 20(c) of the Interstate Commerce Ac or by filing a financing statement pursuant to subsection (1).

History: En. Sec. 2, Ch. 76, L. 1965; amd. Sec. 2, Ch. 279, L. 1967; amd. Sec. 14, Ch. 265, L 1977; R.C.M. 1947, 87A-9-302.2.

30-9-410. Continued applicability of laws to transmitting utilities. Unless displaced by the specific provisions of 30-9-408 througl 30-9-410, this code and other applicable laws remain in full force and effec and supplement the provisions of 30-9-408 through 30-9-410.

History: En. Sec. 3, Ch. 76, L. 1965; R.C.M. 1947, 87A-9-302.3.

30-9-411. Security agreements and termination statements — when destroyed. Termination statements filed under this chapter shall b retained by the filing officer for a period of 8 years after receipt, after whicl they may be destroyed. Financing statements, continuation statements, statements of assignment, and statements of release, the filing of which is authorized by this chapter and as to which no termination statement has been filed shall be retained by the filing officer for a period of 8 years after lapse o the original financing statement or of the latest continuation statement whichever is later. At the expiration of such period all such statements ma be destroyed.

History: En. 59-516.1 by Sec. 11-144, Ch. 264, L. 1963; R.C.M. 1947, 59-516.1.

Part 5

Default

30-9-501. Default — procedure when security agreement cov-
s both real and personal property. (1) When a debtor is in default
der a security agreement, a secured party has the rights and remedies pro-
led in this part and except as limited by subsection (3) those provided in
e security agreement. He may reduce his claim to judgment, foreclose or
herwise enforce the security interest by any available judicial procedure. If
e collateral is documents the secured party may proceed either as to the
cuments or as to the goods covered thereby. A secured party in possession
s the rights, remedies and duties provided in 30-9-207. The rights and
medies referred to in this subsection are cumulative.

(2) After default, the debtor has the rights and remedies provided in this
rt, those provided in the security agreement and those provided in
-9-207.

(3) To the extent that they give rights to the debtor and impose duties
the secured party, the rules stated in the subsections referred to below
ay not be waived or varied except as provided with respect to compulsory
sposition of collateral (subsection (1) of 30-9-505) and with respect to
demption of collateral (30-9-506) but the parties may by agreement deter-
ine the standards by which the fulfillment of these rights and duties is to
measured if such standards are not manifestly unreasonable:

(a) subsection (2) of 30-9-502 and subsection (2) of 30-9-504 insofar as
ey require accounting for surplus proceeds of collateral;

(b) subsection (3) of 30-9-504 and subsection (1) of 30-9-505 which deal
th disposition of collateral;

(c) subsection (2) of 30-9-505 which deals with acceptance of collateral as
scharge of obligation;

(d) section 30-9-506 which deals with redemption of collateral; and

(e) subsection (1) of 30-9-507 which deals with the secured party's liabil-
for failure to comply with this part.

(4) If the security agreement covers both real and personal property, the
cured party may proceed under this part as to the personal property or he
ay proceed as to both the real and the personal property in accordance
ith his rights and remedies in respect of the real property in which case the
ovisions of this part do not apply.

(5) When a secured party has reduced his claim to judgment the lien of
y levy which may be made upon his collateral by virtue of any execution
sed upon the judgment shall relate back to the date of the perfection of
e security interest in such collateral. A judicial sale, pursuant to such
ecution, is a foreclosure of the security interest by judicial procedure
ithin the meaning of this section, and the secured party may purchase at
e sale and thereafter hold the collateral free of any other requirements of
is chapter.

History: En. Sec. 9-501, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-501.

30-9-502. Collection rights of secured party. (1) When so agree and in any event on default the secured party is entitled to notify an accou debtor or the obligor on an instrument to make payment to him whether not the assignor was theretofore making collections on the collateral, and al to take control of any proceeds to which he is entitled under 30-9-306.

(2) A secured party who by agreement is entitled to charge back unco lected collateral or otherwise to full or limited recourse against the debt and who undertakes to collect from the account debtors or obligors must pr ceed in a commercially reasonable manner and may deduct his reasonab expenses of realization from the collections. If the security agreement secure an indebtedness, the secured party must account to the debtor for any su plus, and unless otherwise agreed, the debtor is liable for any deficiency. Bu if the underlying transaction was a sale of accounts, contract rights, or cha tel paper, the debtor is entitled to any surplus or is liable for any deficienc only if the security agreement so provides.

History: **En. Sec. 9-502, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-502.**

30-9-503. Secured party's right to take possession afte default. Unless otherwise agreed a secured party has on default the right t take possession of the collateral. In taking possession a secured party ma proceed without judicial process if this can be done without breach of th peace or may proceed by action. If the security agreement so provides th secured party may require the debtor to assemble the collateral and make i available to the secured party at a place to be designated by the secure party which is reasonably convenient to both parties. Without removal secured party may render equipment unusable, and may dispose of collatera on the debtor's premises under 30-9-504.

History: **En. Sec. 9-503, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-503.**

30-9-504. Secured party's right to dispose of collateral afte default — effect of disposition. (1) A secured party after default ma sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. An sale of goods is subject to the Chapter on Sales (Chapter 2). The proceed of disposition shall be applied in the order following to:

(a) the reasonable expenses of retaking, holding, preparing for sale, sellin and the like and, to the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by th secured party;

(b) the satisfaction of indebtedness secured by the security interest unde which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate securit interest in the collateral if written notification of demand therefor is receive before distribution of the proceeds is completed. If requested by the secure party, the holder of a subordinate security interest must seasonably furnis reasonable proof of his interest, and unless he does so, the secured part need not comply with his demand.

(2) If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a

ale of account, contract rights, or chattel paper, the debtor is entitled to any urplus or is liable for any deficiency only if the security agreement so pro-ides.

(3) Disposition of the collateral may be by public or private proceedings nd may be made by way of one or more contracts. Sale or other disposition ay be as a unit or in parcels and at any time and place and on any terms ut every aspect of the disposition including the method, manner, time, place nd terms must be commercially reasonable. Unless collateral is perishable or hreatens to decline speedily in value or is of a type customarily sold on a ecognized market, reasonable notification of the time and place of any ublic sale or reasonable notification of the time after which any private sale r other intended disposition is to be made shall be sent by the secured party o the debtor, and except in the case of consumer goods to any other person ho has a security interest in the collateral and who has duly filed a financng statement indexed in the name of the debtor in this state or who is nown by the secured party to have a security interest in the collateral. The ecured party may buy at any public sale and if the collateral is of a type ustomarily sold in a recognized market or is of a type which is the subject f widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the lisposition transfers to a purchaser for value all of the debtor's rights herein, discharges the security interest under which it is made and any ecurity interest or lien subordinate thereto. The purchaser takes free of all uch rights and interests even though the secured party fails to comply with he requirements of this part or of any judicial proceedings:

(a) in the case of a public sale, if the purchaser has no knowledge of any lefects in the sale and if he does not buy in collusion with the secured party, ther bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, endorsenent, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to his rights has thereafter the ights and duties of the secured party. Such a transfer of collateral is not a ale or disposition of the collateral under this chapter.

History: **En. Sec. 9-504, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-504.**

30-9-505. Compulsory disposition of collateral — acceptance of he collateral as discharge of obligation. (1) If the debtor has paid 60% of the cash price in the case of a purchase money security interest in onsumer goods or 60% of the loan in the case of another security interest n consumer goods, and has not signed after default a statement renouncing r modifying his rights under this part a secured party who has taken possesion of collateral must dispose of it under 30-9-504 and if he fails to do so within 90 days after he takes possession the debtor at his option may recover n conversion or under 30-9-507(1) on secured party's liability.

(2) In any other case involving consumer goods or any other collateral a ecured party in possession may, after default, propose to retain the collateral in satisfaction of the obligation. Written notice of such proposal shall be

sent to the debtor and except in the case of consumer goods to any othe secured party who has a security interest in the collateral and who has dul filed a financing statement indexed in the name of the debtor in this stat or is known by the secured party in possession to have a security interest i it. If the debtor or other person entitled to receive notification objects i writing within 30 days from the receipt of the notification or if any othe secured party objects in writing within 30 days after the secured part obtains possession the secured party must dispose of the collateral unde 30-9-504. In the absence of such written objection the secured party may retain the collateral in satisfaction of the debtor's obligation.

History: **En. Sec. 9-505, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-505.**

30-9-506. Debtor's right to redeem collateral. At any time before the secured party has disposed of collateral or entered into a contract for its disposition under 30-9-504 or before the obligation has been discharged under 30-9-505(2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses.

History: **En. Sec. 9-506, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-506.**

30-9-507. Secured party's liability for failure to comply with this part. (1) If it is established that the secured party is not proceeding in accordance with the provisions of this part disposition may be ordered or restrained on appropriate terms and conditions. If the disposition has occurred the debtor or any person entitled to notification or whose security interest has been made known to the secured party prior to the disposition has a right to recover from the secured party any loss caused by failure to comply with the provisions of this part. If the collateral is consumer goods, the debtor has a right to recover in any event an amount not less than the credit service charge plus 10% of the principal amount of the debt or the time price differential plus 10% of the cash price.

(2) The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the secured party is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If the secured party either sells the collateral in the usual manner in any recognized market therefor or if he sells at the price current in such market at the time of his sale or if he has otherwise sold in conformity with reasonable commercial practices among dealers in the type of property sold he has sold in a commercially reasonable manner. The principles stated in the two preceding sentences with respect to sales also apply as may be appropriate to other types of disposition. A disposition which has been approved in any judicial proceeding or by any bona fide creditors' committee or representative of creditors shall conclusively be deemed to be commercially reasonable, but this sentence does not indicate that any such approval must be obtained in any case nor does it indicate that any disposition not so approved is not commercially reasonable.

History: **En. Sec. 9-507, Ch. 264, L. 1963; R.C.M. 1947, 87A-9-507.**

30-9-508. Foreclosure of security interests in personal proprty. An action for the foreclosure of a security interest in personal property may be commenced and conducted in the same manner as provided by law or the foreclosure by action of mortgages upon real property, and the same may be joined in an action for the recovery of the possession of the property ubject to the security interest, but the remedial scope of proceedings for the oreclosure of interests subject to this chapter is governed by this part.

History: En. Sec. 3872, Civ. C. 1895; re-en. Sec. 5769, Rev. C. 1907; amd. Sec. 12, Ch. 86, L. 913; re-en. Sec. 8286, R.C.M. 1921; re-en. Sec. 8286, R.C.M. 1935; amd. Sec. 11-135, Ch. 264, L. 963; R.C.M. 1947, 52-312; amd. Sec. 1, Ch. 189, L. 1979.

30-9-509. Repealed. Sec. 3, Ch. 189, L. 1979.

30-9-510. Repealed. Sec. 3, Ch. 189, L. 1979.

30-9-511. Counsel fees on foreclosure. In an action to foreclose a ecurity interest in personal property, the court must allow as a part of the osts a reasonable attorney's fee, which shall be fixed by the court, notwithstanding any stipulation in the instrument or any agreement between the parties to the contrary.

History: En. Sec. 1862, C. Civ. Proc. 1895; re-en. Sec. 7165, Rev. C. 1907; re-en. Sec. 9798, R.C.M. 1921; re-en. Sec. 9798, R.C.M. 1935; amd. Sec. 11-169, Ch. 264, L. 1963; R.C.M. 1947, 3-8613(part).

CHAPTER 10

SECURITIES REGULATION

Part 1 — General Application

Section
30-10-101. Short title.
30-10-102. Policy.
30-10-103. Definitions.
30-10-104. Exempt securities.
30-10-105. Exempt transactions.
30-10-106. Proof of exemption.
30-10-107. Administration.

Part 2 — Registration of Dealers and Securities

30-10-201. Registration of broker-dealers, salesmen, and investment advisers.
30-10-202. Registration of securities.
30-10-203. Registration by notification.
30-10-204. Registration by coordination.
30-10-205. Registration by qualification.
30-10-206. General provisions regarding registration of securities.
30-10-207. Denial, suspension, and revocation of registration of securities.
30-10-208. Consent to service of process.
30-10-209. Fees.
30-10-210. Examination costs.

Part 3 — Offenses and Penalties

30-10-301. Prohibited practices.
30-10-302. Misleading filings.
30-10-303. Unlawful representation concerning registration or exemption.

30-10-304. Investigations and subpoenas.
30-10-305. Injunctions and other remedies.
30-10-306. Criminal liabilities.
30-10-307. Civil liabilities.
30-10-308. Judicial review of orders.

Part 4 — Fiduciary Security Transfers

30-10-401. Short title.
30-10-402. Definitions.
30-10-403. Registration in the name of fiduciary.
30-10-404. Assignment by fiduciary.
30-10-405. Evidence of appointment or incumbency.
30-10-406. Adverse claims.
30-10-407. Nonliability of corporation and transfer agent.
30-10-408. Nonliability of third persons.
30-10-409. Territorial application.
30-10-410. Tax obligations.
30-10-411. Uniformity of interpretation.

Part 1

General Application

30-10-101. Short title. Parts 1 through 3 of this chapter may be cited as the "Securities Act of Montana".

History: En. Sec. 2, Ch. 251, L. 1961; R.C.M. 1947, 15-2002.

30-10-102. Policy. Parts 1 through 3 of this chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 3, Ch. 251, L. 1961; R.C.M. 1947, 15-2003.

30-10-103. Definitions. When used in parts 1 through 3 of this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Commissioner" means securities commissioner of this state.

(2) "Salesman" means any individual other than a broker-dealer who represents a broker-dealer or issuer in effecting or attempting to effect sales of securities, but "salesman" does not include an individual who represents an issuer in:

(a) effecting a transaction in a security exempted by subsections (1), (2), (3), (9), (10), or (11) of 30-10-104;

(b) effecting transactions exempted by 30-10-105; or

(c) effecting transactions with existing employees, partners, or directors of the issuer if no commission or other remuneration is paid or given directly or indirectly for soliciting any person in this state. A partner, officer, or director of a broker-dealer or issuer is a "salesman" only if he otherwise comes within this definition.

(3) "Broker-dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his own account. "Broker-dealer" does not include:

(a) a salesman, issuer, bank, savings institution, trust company, or insurance company; or

(b) a person who has no place of business in this state if he effects trans- tions in this state exclusively with or through the issuers of the securities volved in the transactions, other broker-dealers, or banks, savings insti- tions, trust companies, insurance companies, investment companies as efined in the Investment Company Act of 1940, pension or profit-sharing usts, or other financial institutions or institutional buyers, whether acting r themselves or as trustee.

(4) "Guaranteed" means guaranteed as to payment of principal, interest, dividends.

(5) "Investment adviser" means any person who, for compensation, igages in the business of advising others, either directly or through publi- ations or writings, as to the value of securities or as to the advisability of vesting in, purchasing, or selling securities or who, for compensation and as part of a regular business, issues or promulgates analyses or reports con- erning securities. "Investment adviser" does not include:

(a) a bank, savings institution, trust company, or insurance company;

(b) a lawyer, accountant, engineer, or teacher whose performance of these ervices is solely incidental to the practice of his profession;

(c) a broker-dealer;

(d) a publisher of any bona fide newspaper, news magazine, or business r financial publication of general, regular, and paid circulation;

(e) a person whose advice, analyses, or reports relate only to securities kempted by 30-10-104(1);

(f) a person who has no place of business in this state if his only clients this state are other investment advisers, broker-dealers, banks, savings istitutions, trust companies, insurance companies, investment companies as efined in the Investment Company Act of 1940, pension or profit-sharing usts, or other financial institutions or institutional buyers, whether acting r themselves or as trustees; or

(g) such other persons not within the intent of this subsection (5) as the ommissioner may by rule or order designate.

(6) "Issuer" means any person who issues or proposes to issue any secur- y, except that with respect to certificates of deposit, voting-trust certifi- ates, or collateral-trust certificates or with respect to certificates of interest r shares in an unincorporated investment trust not having a board of direc- ors (or persons performing similar functions) or of the fixed, restricted man- gement, or unit type, the term "issuer" means the person or persons erforming the acts and assuming the duties of depositor or manager pur- uant to the provisions of the trust or other agreement or instrument under hich the security is issued.

(7) "Nonissuer" means not directly or indirectly for the benefit of the suer.

(8) "Person", for the purpose of parts 1 through 3 of this chapter, means n individual, a corporation, a partnership, an association, a joint-stock com- any, a trust where the interests of the beneficiaries are evidenced by a ecurity, an unincorporated organization, a government, or a political subdivi- ion of a government.

(9) (a) "Sale" or "sell" includes every contract of sale of, contract to sell, r disposition of a security or interest in a security for value.

(b) "Offer" or "offer to sell" includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

(c) Any security given or delivered with, or as a bonus on account of, any purchase of securities or any other thing is considered to constitute part of the subject of the purchase and to have been offered and sold for value. A purported gift of assessable stock is considered to involve an offer and sale. Every sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer, as well as every sale or offer of a security which gives the holder a present or future right or privilege to convert into another security of the same or another issuer, is considered to include an offer of the other security.

(10) "Securities Act of 1933", "Securities Exchange Act of 1934", "Public Utility Holding Company Act of 1935", and "Investment Company Act of 1940" mean the federal statutes of those names as amended before or after July 1, 1961.

(11) "Security" means any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate; preorganization certificate or subscription; transferable shares; investment contract; voting-trust certificate; certificate of deposit for a security; certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease; or, in general, any interest or instrument commonly known as a "security" or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing. "Security" does not include any insurance or endowment policy or annuity contract under which an insurance company promises to pay a sum of money either in a lump sum or periodically for life or some other specified period.

(12) "State" means any state, territory, or possession of the United States, as well as the District of Columbia and Puerto Rico.

History: En. Sec. 4, Ch. 251, L. 1961; R.C.M. 1947, 15-2004; amd. Secs. 1, 8, Ch. 351, L. 1979.

30-10-104. Exempt securities. Sections 30-10-202 through 30-10-207 do not apply to any of the following securities:

(1) any security (including a revenue obligation) issued or guaranteed by the United States, any state, any political subdivision of a state, or any agency or corporate or other instrumentality of one or more of the foregoing; provided, however, 30-10-202 through 30-10-207 apply to a security issued by any of the foregoing that is payable solely from payments to be received in respect of property or money used under a lease, sale, or loan arrangement by or for a nongovernmental industrial or commercial enterprise, unless such enterprise or any security of which it is the issuer is within any of the exemptions enumerated in subsections (2) through (9) of this section;

(2) any security issued or guaranteed by Canada, any Canadian province, any political subdivision of any such province, any agency or corporate or other instrumentality of one or more of the foregoing or any other foreign government with which the United States currently maintains diplomatic relations, if the security is recognized as a valid obligation by the issuer or guarantor;

(3) any security issued by and representing an interest in or a debt of or aranteed by any bank organized under the laws of the United States or y bank, savings institution, or trust company organized or chartered as ch and under the jurisdiction and supervision of the superintendent of nks of any state;

(4) any security issued by and representing an interest in or a debt of or aranteed by any federal savings and loan association or any building and an or similar association organized under the laws of any state and author- ed to do business in this state;

(5) any insurance or endowment policy or annuity contract or optional nuity contract issued by a corporation subject to the supervision of the surance commissioner;

(6) any security issued or guaranteed by any federal credit union or any edit union, industrial loan association, or similar association organized and pervised under the laws of this state;

(7) any security issued or guaranteed by any railroad, other common car- er, public utility, or holding company which is:

(a) subject to the jurisdiction of the interstate commerce commission;

(b) a registered holding company under the Public Utility Holding Com- any Act of 1935 or a subsidiary of such a company within the meaning of at act;

(c) regulated in respect of its rates and charges by a governmental thority of the United States or any state or municipality; or

(d) regulated in respect to the issuance or guarantee of the security by a vernmental authority of the United States, any state, Canada, or any Cana- an province; also equipment trust certificates in respect to equipment con- tionally sold or leased to a railroad or public utility, if other securities sued by such railroad or public utility would be exempt under this subsec- on;

(8) any security that meets all of the following conditions:

(a) if the issuer is not organized under the laws of the United States or state, it has appointed a duly authorized agent in the United States for ser- ce of process and has set forth the name and address of such agent in its rospectus;

(b) a class of the issuer's securities is required to be and is registered nder section 12 of the Securities Exchange Act of 1934 and has been so gistered for the 3 years immediately preceding the offering date;

(c) neither the issuer nor a significant subsidiary has had a material efault during the last 7 years (or the issuer's existence if less than 7 years) the payment of:

(i) principal, interest, dividend, or sinking fund installment on preferred ock or indebtedness for borrowed money; or

(ii) rentals under leases with terms of 3 years or more;

(d) the issuer has had consolidated net income (before extraordinary ems and the cumulative effect of accounting changes) of at least $1 million 4 of its last 5 fiscal years including its last fiscal year; and if the offering of interest-bearing securities, has had for its last fiscal year such net come, but before deduction for income taxes and depreciation, of at least ½ times the issuer's annual interest expense, giving effect to the proposed ffering and the intended use of the proceeds. "Last fiscal year" as used in this subsection (8)(d), means the most recent year for which audited financia statements are available, provided that such statements cover a fiscal perio ended not more than 15 months from the commencement of the offering.

(e) if the offering is of stock or shares, other than preferred stock o shares, such securities have voting rights and such rights include the right t have at least as many votes per share and the right to vote on at least a many general corporate decisions as each of the issuer's outstanding classe of stock or shares, except as otherwise required by law;

(f) if the offering is of stock or shares, other than preferred stock o shares, such securities are owned beneficially or of record on any date withi 6 months prior to the commencement of the offering by at least 1,200 persons and on such date there are at least 750,000 such shares outstanding with an aggregate market value, based on the average bid price for that day, o at least $3,750,000. In connection with the determination of the number o persons who are beneficial owners of the stock or shares of an issuer, the issuer or broker-dealer may rely in good faith for the purposes of this section upon written information furnished by the record owners.

(9) any security issued by any person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable, fraternal, social, athletic, or reformatory purposes if the issuer pays a fee of $50 and files with the commissioner 20 days prior to the offering a written notice specifying the terms of the offer and the commissioner does not disallow the exemption in writing within such 20-day period;

(10) any commercial paper which arises out of a current transaction or the proceeds of which have been or are to be used for current transaction and which evidences an obligation to pay cash within 9 months of the date of issuance, exclusive of days of grace, or any renewal of such paper which is likewise limited or any guarantee of such paper or of any such renewal, when such commercial paper is sold to the banks or insurance companies;

(11) any investment contract issued in connection with an employee's stock purchase, savings, pension, profit-sharing, or similar benefit plan;

(12) any security for which registration is not necessary for protection of investors, as determined by the commissioner by order. The commissioner may charge a fee of $50 for granting the exemption by order.

History: **En. Sec. 13, Ch. 251, L. 1961; R.C.M. 1947, 15-2013; amd. Sec. 2, Ch. 351, L. 1979.**

30-10-105. Exempt transactions. Except as in this section expressly provided, 30-10-201 through 30-10-207 shall not apply to any of the following transactions:

(1) any nonissuer isolated transaction, whether effected through a broker-dealer or not;

(2) (a) any nonissuer distribution of an outstanding security by a registered broker-dealer if:

(i) a recognized securities manual contains the names of the issuer's officers and directors, a balance sheet of the issuer as of a date within 18 months, and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations; or

(ii) the security has a fixed maturity or a fixed interest or dividend provision and there has been no default during the current fiscal year or within the 3 preceding fiscal years, or during the existence of the issuer and any edecessors if less than 3 years, in the payment of principal, interest, or vidends on the security;

(b) the commissioner may by order deny or revoke the exemption speci-ed in this subsection (2) with respect to a specific security. Upon the entry such an order, the commissioner shall promptly notify all registered bro-er-dealers that it has been entered and of the reasons therefor and that ithin 15 days of the receipt of a written request the matter will be set down r hearing. If no hearing is requested and none is ordered by the commis-oner, the order will remain in effect until it is modified or vacated by the ommissioner. If a hearing is requested or ordered, the commissioner, after otice of and opportunity for hearing to all interested persons, may modify vacate the order or extend it until final determination. No order under is subsection may operate retroactively. No person may be considered to ave violated parts 1 through 3 of this chapter by reason of any offer or sale fected after the entry of an order under this subsection if he sustains the urden of proof that he did not know and in the exercise of reasonable care ould not have known of the order.

(3) any nonissuer transaction effected by or through a registered broker-ealer pursuant to an unsolicited order or offer to buy, but the commissioner ay require that the customer acknowledge upon a specified form that the le was unsolicited and that a signed copy of each form be preserved by the roker-dealer for a specified period;

(4) any transaction between the issuer or other person on whose behalf e offering is made and an underwriter or among underwriters;

(5) any transaction by an executor, administrator, sheriff, marshal, eceiver, trustee in bankruptcy, guardian, or conservator in the performance f his official duties as such;

(6) any transaction executed by a bona fide pledgee without any purpose f evading parts 1 through 3 of this chapter;

(7) any offer or sale to a bank, savings institution, trust company, insur-nce company, investment company as defined in the Investment Company ct of 1940, pension or profit-sharing trust, or other financial institution or nstitutional buyer, or to a broker-dealer, whether the purchaser is acting for self or in some fiduciary capacity;

(8) any transaction pursuant to an offer directed by the offerer to not ore than 10 persons (other than those designated in subsection (7) of this ection) in this state during any period of 12 consecutive months, whether or ot the offerer or any of the offerees is then present in this state, if:

(a) the seller reasonably believes that all the buyers are purchasing for nvestment; and

(b) no commission or other remuneration is paid or given directly or indi-ectly for soliciting any prospective buyer; provided, however, that a commis-ion may be paid to a registered broker-dealer if the securities involved are egistered with the United States securities and exchange commission under he Federal Securities and Exchange Act of 1933, as amended;

(9) any offer or sale of a preorganization certificate or subscription if:

(a) no commission or other remuneration is paid or given directly or indi-ectly for soliciting any prospective subscriber;

(b) the number of subscribers does not exceed 10; and

(c) no payment is made by any subscriber;

(10) any transaction pursuant to an offer to existing security holders of th issuer, including persons who at the time of the transaction are holders convertible securities, nontransferable warrants, or transferable warran exercisable within not more than 90 days of their issuance, if:

(a) no commission or other remuneration (other than a standby commi sion) is paid or given directly or indirectly for soliciting any security hold in this state; or

(b) the issuer first files a notice specifying the terms of the offer and th commissioner does not by order disallow either (a) or (b) of this subsection;

(11) any offer (but not a sale) of a security for which registration stat ments have been filed under both parts 1 through 3 of this chapter and th Securities Act of 1933 if no stop order or refusal order is in effect and n public proceeding or examination looking toward such an order is pendin under either law;

(12) any offer (but not a sale) of a security for which a registration stat ment has been filed under parts 1 through 3 of this chapter and the commis sioner, in his discretion, does not disallow the offer in writing within 10 day of such filing;

(13) the issuance of any stock dividend, whether the corporation distrib uting the dividend is the issuer of the stock or not, if nothing of value i given by stockholders for the distribution other than the surrender of a righ to a cash dividend where the stockholder can elect to take a dividend in cas or stock;

(14) any transaction incident to a right of conversion or a statutory o judicially approved reclassification, recapitalization, reorganization, quasi reorganization, stock split, reverse stock split, merger, consolidation, or sal of assets.

History: En. Sec. 14, Ch. 251, L. 1961; amd. Sec. 1, Ch. 185, L. 1973; R.C.M. 1947, 15-201 amd. Sec. 3, Ch. 351, L. 1979.

30-10-106. Proof of exemption. In any proceeding under parts through 3 of this chapter, the burden of proving an exemption or an excep tion from a definition is upon the person claiming it.

History: En. Sec. 25, Ch. 251, L. 1961; R.C.M. 1947, 15-2025.

30-10-107. Administration. (1) The administration of the provisions of parts 1 through 3 of this chapter shall be under the general supervisio and control of the state auditor, the ex officio securities commissioner. Th commissioner may from time to time make, amend, and rescind such rule and forms as are necessary to carry out the provisions of parts 1 through of this chapter. No rule or form may be made unless the commissioner find that the action is necessary or appropriate in the public interest or for th protection of investors and consistent with the purposes fairly intended b the policy and provisions of parts 1 through 3 of this chapter. In prescribing rules and forms the commissioner may cooperate with the securities administrators of the other states and the securities and exchange commission with a view to effectuating the policy of parts 1 through 3 of this chapter to achieve maximum uniformity in the form and content of registration statements, applications, and reports wherever practicable.

(2) It is unlawful for the commissioner or any of his officers or employees to use for personal benefit any information which is filed with or obtained

y the commissioner and which is not made public. No provision of parts 1 hrough 3 of this chapter authorizes the commissioner or any of his officers r employees to disclose any such information or the fact that any investiga- ion is being made, except among themselves or when necessary or appropri- te in a proceeding or investigation under parts 1 through 3 of this chapter.

(3) No provision of parts 1 through 3 of this chapter imposing any liabil- ty applies to any act done or omitted in good faith in conformity with any ule, form, or order of the commissioner, notwithstanding that the rule or orm may later be amended or rescinded or be determined by judicial or ther authority to be invalid for any reason.

(4) Every hearing in an administrative proceeding shall be public unless he commissioner in his discretion grants a request joined in by all the espondents that the hearing be conducted privately.

(5) A document is filed when it is received by the commissioner. The ommissioner shall keep a register of all applications for registration and egistration statements which are or have ever been effective under parts 1 hrough 3 of this chapter and all denial, suspension, or revocation orders vhich have ever been entered under parts 1 through 3 of this chapter. The egister shall be open for public inspection. The information contained in or iled with any registration statement, application, or report may be made vailable to the public under such rules as the commissioner prescribes.

(6) Upon request and at such reasonable charges as he prescribes, the ommissioner shall furnish to any person photostatic or other copies (certi- ied under his seal of office if requested) of any entry in the register or any locument which is a matter of public record. In any proceeding or prose- ution under parts 1 through 3 of this chapter, any copy so certified is prima acie evidence of the contents of the entry or document certified.

History: En. Sec. 24, Ch. 251, L. 1961; amd. Sec. 71, Ch. 147, L. 1963; R.C.M. 1947, 15-2024(1), 3) thru (7); amd. Sec. 8, Ch. 351, L. 1979.

Part 2

Registration of Dealers and Securities

30-10-201. Registration of broker-dealers, salesmen, and nvestment advisers. (1) It is unlawful for any person to transact business n this state as a broker-dealer or salesman, except in transactions exempt nder 30-10-105, unless he is registered under parts 1 through 3 of this chap- er.

(2) It is unlawful for a broker-dealer or issuer to employ a salesman to epresent him in this state, except in transactions exempt under 30-10-105, nless the salesman is registered under parts 1 through 3 of this chapter.

(3) It is unlawful for any person to transact business in this state as an nvestment adviser unless:

(a) he is so registered under parts 1 through 3 of this chapter;

(b) he is registered as a broker-dealer under parts 1 through 3 of this hapter; or

(c) his only clients in this state are investment companies, as defined in the Investment Company Act of 1940, or insurance companies.

(4) A broker-dealer or a salesman, acting as an agent for an issuer or an agent for a broker-dealer in the offer or sale of securities for an issu or an investment adviser may apply for registration by filing with the co missioner an application in such form as the commissioner prescribes a payment of the fee prescribed in 30-10-209. Except for persons in the empl of brokerage firms governed by the regulations of the securities and exchan commission, all salesmen must be legal residents of this state and must ha actually resided in this state for a period of at least 1 year next prior to t date of application for registration. The commissioner may, upon request a for good cause shown by an applicant, waive the residency requirement. salesman acting as agent for an issuer or broker-dealer who is not current in compliance with the financial responsibility requirements prescribed the Securities Exchange Act of 1934 and by regulations adopted under may, in the discretion of the commissioner, be required to file with the co missioner a bond of a surety company duly authorized to transact busine in this state. The bond shall be in an amount determined by the commi sioner, payable to the state of Montana and conditioned upon the faithf compliance with the provisions of parts 1 through 3 of this chapter, and pr vide that upon failure to so comply, the salesman shall be liable to any a all persons who may suffer loss by reason thereof.

(5) The application shall contain whatever information the commission requires.

(6) If no denial order is in effect and no proceeding is pending under su section (10) of this section, registration becomes effective at noon of the 30t day after an application is filed. The commissioner may specify an earli effective date, and he may by order defer the effective date for an addition 60 days. The effective day after the filing of any amendment shall be noo of the 30th day thereafter unless otherwise accelerated by the commissioner.

(7) Registration of a broker-dealer, salesman, or investment adviser sha be effective until March 1 following such registration and may be renewe The registration of a salesman is not effective during any period when he not associated with an issuer or a registered broker-dealer specified in hi application. When a salesman begins or terminates a connection with a issuer or registered broker-dealer, the salesman and the issuer or broke dealer shall promptly notify the commissioner.

(8) Registration of a broker-dealer, salesman, or investment adviser ma be renewed by filing with the commissioner prior to the expiration there an application containing such information as the commissioner may requir to indicate any material change in the information contained in the origina application or any renewal application for registration as a broker-deale salesman, or investment adviser filed with the commissioner by the applican payment of the prescribed fee, and, in the case of a broker-dealer, by filin a financial statement showing the financial condition of such broker-dealer a of a date within 90 days. A registered broker-dealer or investment advise may file an application for registration of a successor, to become effectiv upon approval of the commissioner.

(9) Every registered broker-dealer and investment adviser shall make an keep such accounts and other records, except with respect to securitie exempt under 30-10-104(1), as may be prescribed by the commissioner. Al records so required shall be preserved for 3 years unless the commissione

rescribes otherwise for particular types of records. All the records of a regis- ered broker-dealer or investment adviser are subject at any time or from me to time to such reasonable periodic, special, or other examinations, ithin or without this state, by representatives of the commissioner, as the ommissioner considers necessary or appropriate in the public interest or for he protection of investors.

(10) The commissioner may by order deny, suspend, or revoke registration f any broker-dealer, salesman, or investment adviser if he finds that the order is in the public interest and that the applicant or registrant or, in the case of a broker-dealer or investment adviser, any partner, officer, or direc- or:

(a) has filed an application for registration under this section which, as f its effective date or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained any statement which was, in the light of the circumstances under which it was made, false or misleading with respect to any material fact;

(b) has willfully violated or willfully failed to comply with any provision f parts 1 through 3 of this chapter or a predecessor law or any rule or order nder parts 1 through 3 of this chapter or a predecessor law;

(c) has been convicted of any misdemeanor involving a security or any spect of the securities business or any felony;

(d) is permanently or temporarily enjoined by any court of competent urisdiction from engaging in or continuing any conduct or practice involving ny aspect of the securities business;

(e) is the subject of an order of the commissioner denying, suspending, or evoking registration as a broker-dealer, salesman, or investment adviser;

(f) is the subject of an order entered within the past 5 years by the ecurities administrator of any other state or by the federal securities and xchange commission denying or revoking registration as a broker-dealer or alesman or the substantial equivalent of those terms as defined in parts 1 through 3 of this chapter or is the subject of an order of the federal securities and exchange commission suspending or expelling him from a national ecurities exchange or national securities association registered under the Securities Exchange Act of 1934 or is the subject of a United States post ffice fraud order, but:

(i) the commissioner may not institute a revocation or suspension proceeding under this subsection (f) more than 1 year from the date of the order relied on; and

(ii) he may not enter any order under this subsection (f) on the basis of an order unless that order was based on facts which would currently constitute a ground for an order under this section;

(g) has engaged in dishonest or unethical practices in the securities business;

(h) is insolvent, either in the sense that his liabilities exceed his assets or n the sense that he cannot meet his obligations as they mature, but the commissioner may not enter an order against a broker-dealer or investment adviser under this subsection (h) without a finding of insolvency as to the broker-dealer or investment adviser;

(i) has not complied with a condition imposed by the commissioner under subsection (10) of this section or is not qualified on the basis of such factors as training, experience, or knowledge of the securities business; or

(j) has failed to pay the proper filing fee, but the commissioner may enter only a denial order under this subsection (j), and he shall vacate any such order when the deficiency has been corrected. The commissioner may by order summarily postpone or suspend registration pending final determination of any proceeding under this section.

(11) Upon the entry of the order under subsection (10) of this section, the commissioner shall promptly notify the applicant or registrant, as well as the employer or prospective employer if the applicant or registrant is a salesman, that it has been entered and of the reasons therefor and that if requested by the applicant or registrant within 15 days after the receipt of the commissioner's notification the matter will be promptly set down for hearing. If no hearing is requested within 15 days and none is ordered by the commissioner, the order will remain in effect until it is modified or vacated by the commissioner. If a hearing is requested or ordered, the commissioner, after notice of and opportunity for hearing, may affirm, modify, or vacate the order.

(12) If the commissioner finds that any registrant or applicant for registration is no longer in existence or has ceased to do business as a broker-dealer, investment adviser, or salesman or is subject to an adjudication of mental incompetence or to the control of a committee, conservator, or guardian or cannot be located after reasonable search, the commissioner may by order cancel the registration or application.

History: En. Sec. 6, Ch. 251, L. 1961; amd. Sec. 1, Ch. 265, L. 1977; amd. Sec. 1, Ch. 275, L. 1977; R.C.M. 1947, 15-2006; amd. Sec. 4, Ch. 137, L. 1979; amd. Sec. 4, Ch. 351, L. 1979.

30-10-202. Registration of securities. It is unlawful for any person to offer to sell any security in this state, except securities exempt under 30-10-104 or when sold in transactions exempt under 30-10-105, unless such security is registered by notification, coordination, or qualification under parts 1 through 3 of this chapter.

History: En. Sec. 7, Ch. 251, L. 1961; R.C.M. 1947, 15-2007.

30-10-203. Registration by notification. (1) The following securities may be registered by notification, whether or not they are also eligible for registration by coordination under parts 1 through 3 of this chapter:

(a) any security whose issuer and any predecessors have been in continuous operation for at least 5 years if:

(i) there has been no default during the current fiscal year or within the 3 preceding fiscal years in the payment of principal, interest, or dividends on any security of the issuer (or any predecessor) with a fixed maturity or a fixed interest or dividend provision; and

(ii) the issuer and any predecessors during the past 3 fiscal years have had average net earnings, determined in accordance with generally accepted accounting practices, which are applicable to all securities without a fixed maturity or a fixed interest or dividend provision and which:

(A) equal at least 5% of the amount of securities without a fixed maturity or a fixed interest or dividend provision outstanding at the date the registration statement is filed (as measured by the maximum offering price or the market price on a day selected by the registrant within 30 days before the date of filing the registration statement, whichever is higher, or if there is neither a readily determinable market price nor an offering price, book lue on a day selected by the registrant within 90 days of the date of filing e registration statement); or

(B) if the issuer and any predecessors have not had any securities without fixed maturity or a fixed interest or dividend provision outstanding for 3 ll fiscal years, equal at least 5% of the amount (as measured by the maxi-um public offering price) of such securities which will be outstanding if all e securities being offered or proposed to be offered (whether or not they e proposed to be registered or offered in this state) are issued;

(b) any security (other than a certificate of interest or participation in an l, gas, or mining title or lease or in payments out of production under such title or lease) registered for nonissuer distribution if any security of the me class has ever been registered under parts 1 through 3 of this chapter a predecessor law or the security being registered was originally issued ırsuant to an exemption under parts 1 through 3 of this chapter or a prede-ssor law.

(2) A registration statement by notification shall contain the following formation and be accompanied by the following documents, in addition to ayment of the registration fee prescribed in 30-10-209:

(a) a statement demonstrating eligibility for registration by notification;

(b) with respect to the issuer: its name, address, and form of organization, ie state (or foreign jurisdiction) and the date of its organization, and the eneral character and location of its business;

(c) a description of the securities being registered;

(d) total amount of securities to be offered and amount of securities to e offered in this state;

(e) the price at which the securities are to be offered for sale to the ublic, any variation therefrom at which any portion of the offering is to be ıade to any persons (other than as underwriting and selling discounts or ommissions) and the estimated maximum aggregate underwriting and selling iscounts or commissions and finders' fees (including cash, securities, or any-ıing else of value);

(f) names and addresses of the managing underwriters and a description f the plan of distribution of any securities which are to be offered otherwise han through an underwriter;

(g) description of any security options outstanding or to be created in onnection with the offering;

(h) any adverse order, judgment, or decree previously entered in connec-ion with the offering by any court or the United States securities and xchange commission;

(i) a copy of any offering circular or prospectus to be used in connection vith the offering;

(j) in the case of any registration under subsection (1)(b) of this section elating to nonissuer distribution which does not also satisfy the conditions f subsection (1)(a) of this section, a balance sheet of the issuer as of a date vithin 4 months prior to the filing of the registration statement, and a sum-nary of earnings for each of the 2 fiscal years preceding the date of the bal-ınce sheet and for any period between the close of the last fiscal year and he date of the balance sheet or for the period of the issuer's and any redecessor's existence if less than 2 years;

(k) a consent to service of process meeting the requirements of 30-10-208.

(3) If no stop order is in effect and no proceeding is pending under 30-10-207, a registration statement by notification automatically becomes effective at 3 p.m. mountain standard time the second full business day after the filing of the registration statement or the last amendment, or at such earlier time as the commissioner determines.

History: En. Sec. 8, Ch. 251, L. 1961; R.C.M. 1947, 15-2008.

30-10-204. Registration by coordination. (1) Any security for which a registration statement has been filed under the Securities Act of 1933 or any securities for which filings have been made pursuant to regulation A or regulation E, and amendments thereto, of the general rules and regulations of the United States securities and exchange commission, adopted pursuant to subsection (b) of section 3 of said Securities Act of 1933, in connection with the same offering, may be registered by coordination. A registration statement under this section shall contain the following information and be accompanied by the following documents, in addition to payment of the registration fee prescribed in 30-10-209:

(a) three copies of the prospectus or offering circular and letter of notification filed under the Securities Act of 1933 or the general rules and regulations thereunder, together with all amendments thereto;

(b) the amount of securities to be offered in this state;

(c) the states in which a registration statement or similar document in connection with the offering has been or is expected to be filed;

(d) any adverse order, judgment, or decree previously entered in connection with the offering by any court or the securities and exchange commission;

(e) if the commissioner by rule or otherwise requires, a copy of the articles of incorporation and bylaws (or their substantial equivalents) currently in effect, a copy of any agreements with or among underwriters, a copy of any indenture or other instrument governing the issuance of the security to be registered, and a specimen or copy of the security;

(f) if the commissioner requests, any other information, or copies of any other documents, filed under the Securities Act of 1933;

(g) an undertaking to forward promptly all amendments to the federal registration statement or offering circular and letter of notification, other than an amendment which merely delays the effective date; and

(h) a consent to service of process meeting the requirements of 30-10-208.

(2) A registration statement by coordination under this section automatically becomes effective at the moment the federal registration statement or other filing becomes effective if all the following conditions are satisfied:

(a) no stop order is in effect and no proceeding is pending under 30-10-207;

(b) the registration statement has been on file with the commissioner for at least 10 days; and

(c) a statement of the maximum and minimum proposed offering prices and the maximum underwriting discounts and commissions has been on file for 2 full business days or such shorter period as the commissioner permits by rule or otherwise and the offering is made within those limitations.

(3) The registrant shall promptly notify the commissioner of the date and time when the federal registration statement or other filings became effective

nd the content of the price amendment, if any, and shall promptly file a osteffective amendment containing the information and documents in the rice amendment. "Price amendment" means the final federal amendment hich includes a statement of the offering price, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and ther matters dependent upon the offering price.

(4) Upon failure to receive the required notification and posteffective mendment with respect to the price amendment referred to in subsection) of this section, the commissioner may enter a stop order, without notice hearing, retroactively denying effectiveness to the registration statement or ispending its effectiveness until compliance with subsection (2) of this ection, if he promptly notifies the registrant of the issuance of the order. If ie registrant proves compliance with the requirements as to notice and osteffective amendment, the stop order is void as of the time of its entry. he commissioner may by rule or otherwise waive either or both of the conitions specified in subsections (2)(b) and (2)(c) of this section. If the federal egistration statement or other filing becomes effective before all these conditions are satisfied and they are not waived, the registration statement autoiatically becomes effective as soon as all conditions are satisfied. If the egistrant advises the commissioner of the date when the federal registration atement or other filing is expected to become effective the commissioner iall promptly advise the registrant whether all the conditions are satisfied nd whether he then contemplates the institution of a proceeding under)-10-207; but this advice by the commissioner does not preclude the institution of such a proceeding at any time.

History: En. Sec. 9, Ch. 251, L. 1961; R.C.M. 1947, 15-2009.

30-10-205. Registration by qualification. (1) Any security may be egistered by qualification. A registration statement under this section shall ontain the following information and be accompanied by the following docuients, in addition to payment of the registration fee prescribed in 30-10-209:

(a) with respect to the issuer and any significant subsidiary: its name, ddress, form of organization, the state or foreign jurisdiction and date of its rganization, the general character and location of its business, and a description of its physical properties and equipment;

(b) with respect to every director and officer of the issuer or person occuying a similar status or performing similar functions: his name, address, and rincipal occupation for the past 5 years, the amount of securities of the ssuer held by him as of a specified date within 90 days of the filing of the egistration statement, the remuneration paid to all such persons in the ggregate during the past 12 months and estimated to be paid during the ext 12 months, directly or indirectly, by the issuer (together with all predeessors, parents, and subsidiaries);

(c) with respect to any person not named in subsection (1)(b) of this ection owning of record, or beneficially if known, 10% or more of the outtanding shares of any class of equity security of the issuer: the information pecified in subsection (1)(b) of this section other than his occupation;

(d) with respect to every promoter not named in subsection (1)(b) of this ection, if the issuer was organized within the past 3 years: the information pecified in subsection (1)(b) of this section, any amount paid to him by the issuer within that period or intended to be paid to him, and the consideration for any such payment;

(e) the capitalization and long-term debt (on both a current and a pro forma basis) of the issuer and any significant subsidiary, including a description of each security outstanding or being registered or otherwise offered, and a statement of the amount and kind of consideration (whether in the form of cash, physical assets, services, patents, goodwill, or anything else) for which the issuer or any subsidiary has issued any of its securities within the past 2 years or is obligated to issue any of its securities;

(f) the kind and amount of securities to be offered; the amount to be offered in this state; the proposed offering price and any variation therefrom at which any portion of the offering is to be made to any persons except as underwriting and selling discounts and commissions; the estimated aggregate underwriting and selling discounts, commissions, and other promotional fees (including separately cash, securities, or anything else of value to accrue to the underwriters in connection with the offering); the estimated amounts of other selling expenses, and legal, engineering, and accounting expenses to be incurred by the issuer in connection with the offering; the name and address of every underwriter and every recipient of a promotional fee; a copy of any underwriting or selling group agreement pursuant to which the distribution is to be made, or the proposed form of any such agreement whose terms have not yet been determined; and a description of the plan of distribution of any securities which are to be offered otherwise than through an underwriter;

(g) the estimated cash proceeds to be received by the issuer from the offering, the purposes for which the proceeds are to be used by the issuer, the amount to be used for each purpose, the amounts of any funds to be raised from other sources to achieve the purposes stated and the sources of any such funds, and, if any part of the proceeds is to be used to acquire any property (including goodwill) otherwise than in the ordinary course of business, the names and addresses of the vendors and the purchase price;

(h) a description of any stock options or other security options outstanding or to be created in connection with the offering, together with the amount of any such options held or to be held by every person required to be named in subsections (1)(b), (1)(c), (1)(d), (1)(e), or (1)(g) and by any person who holds or will hold 10% or more in the aggregate of any such options;

(i) the states in which a registration statement or similar document in connection with the offering has been or is expected to be filed;

(j) any adverse order, judgment, or decree previously entered in connection with the offering by any court or the securities and exchange commission, a description of any pending litigation or proceeding to which the issuer is a party and which materially affects its business or assets (including any such litigation or proceeding known to be contemplated by governmental authorities);

(k) a copy of any prospectus or circular intended as of the effective date to be used in connection with the offering;

(l) a specimen or copy of the security being registered, a copy of the issuer's articles of incorporation and bylaws as currently in effect, and a copy of any indenture or other instrument covering the security to be registered;

(m) a signed or conformed copy of an opinion of counsel, if available, as the legality of the security being registered;

(n) a balance sheet of the issuer as of a date within 4 months prior to e filing of the registration statement, a profit and loss statement and analy- of surplus for each of the 3 fiscal years preceding the date of the balance eet and for any period between the close of the last fiscal year and the te of the balance sheet or for the period of the issuer's and any edecessor's existence if less than 3 years, and, if any part of the proceeds the offering is to be applied to the purchase of any business, the same ancial statements which would be required if that business were the regis- ant;

(o) a consent to service of process meeting the requirements of 30-10-208.

(2) In the case of a nonissuer distribution, information may not be quired under this section unless it is known to the person filing the regis- ation statement or to the persons on whose behalf the distribution is to be ade or can be furnished by them without unreasonable effort or expense.

(3) A registration statement by qualification under this section becomes fective when the commissioner so orders. The commissioner may require as condition of registration under this section that a prospectus containing y designated part of the information specified in this section be sent or ven to each person to whom an offer is made before or concurrently with:

(a) the first written offer made to him (otherwise than by means of a blic advertisement) by or for the account of the issuer or any other person whose behalf the offering is being made or by any underwriter or broker- aler who is offering part of an unsold allotment or subscription taken by m as a participant in the distribution;

(b) the confirmation of any sale made by or for the account of any such rson;

(c) payment pursuant to any such sale; or

(d) delivery of the security pursuant to any such sale, whichever first curs, but the commissioner shall accept for use under any such require- ent a current prospectus or offering circular regarding the same securities led under the Securities Act of 1933 or regulations thereunder.

History: En. Sec. 10, Ch. 251, L. 1961; R.C.M. 1947, 15-2010.

30-10-206. General provisions regarding registration of securi- es. (1) A registration statement may be filed by the issuer, any other erson on whose behalf the offering is to be made, or a registered broker- ealer. Any document filed under parts 1 through 3 of this chapter or a redecessor law within 5 years preceding the filing of a registration statement ay be incorporated by reference in the registration statement to the extent at the document is currently accurate. The commissioner may by rule or therwise permit the omission of any item of information or document from ny registration statement.

(2) (a) The commissioner may require as a condition of registration by ualification or coordination:

(i) that any security issued within the past 3 years or to be issued to a romoter for a consideration substantially different from the public offering rice, or to any person for a consideration other than cash, be deposited in scrow; and

(ii) that the proceeds from the sale of the registered security in this stat be impounded until the issuer receives a specified amount from the sale c the security either in this state or elsewhere.

(b) The commissioner may determine the conditions of any escrow c impounding required hereunder but he may not reject a depository solel because of location in another state.

(3) When securities are registered by notification, coordination, or qualification, they may be offered and sold by the issuer, any other person o whose behalf they are registered, or by any registered broker-dealer. Ever registration shall remain effective until revoked by the commissioner or unti terminated upon request of the registrant with the consent of the commissioner; however, said registration shall be automatically suspended upon stop order or suspension proceedings being instituted by the securities an exchange commission relative to said securities and shall continue suspende so long as such proceedings are pending and until the registration or filin with the securities and exchange commission is effective. All outstandin securities of the same class as a currently registered security are considere to be registered for the purpose of any nonissuer transaction. A registratio statement which has become effective may not be withdrawn for 1 year fron its effective date if any securities of the same class are outstanding.

(4) The commissioner may require the person who filed the registratio statement to file reports to keep reasonably current the information contained in the registration statement and to disclose the progress of the offering with respect to registered securities which:

(a) are issued by a face-amount certificate company or a redeemabl security issued by an open-end management company or unit investmen trust as those terms are defined in the Investment Company Act of 1940; or

(b) are being offered and sold directly by or for the account of the issuer.

(5) During the period of public offering in the initial distribution o securities registered under the provisions of parts 1 through 3 of this chapte by notification or qualification, financial data or statements corresponding t those required under the provisions of 30-10-203(2) and 30-10-205 and to th issuer's fiscal year shall be filed with the commissioner annually, not les than 90 days after the end of each such year. If such statements are not certified, the commissioner may verify them by examining the issuer's book and records.

History: **En. Sec. 11, Ch. 251, L. 1961; amd. Sec. 1, Ch. 71, L. 1963; amd. Sec. 1, Ch. 150, L 1977; R.C.M. 1947, 15-2011.**

30-10-207. Denial, suspension, and revocation of registration of securities. (1) The commissioner may issue an order denying effectiveness to, or suspending or revoking the effectiveness of, any registration statement if he finds that the order is in the public interest and that:

(a) the registration statement, as of its effective date or as of any earlier date in the case of an order denying effectiveness, is incomplete in any material respect or contains any statement which was, in the light of the circumstances under which it was made, false or misleading with respect to any material fact;

(b) any provision of parts 1 through 3 of this chapter or any rule, order, or condition lawfully imposed under parts 1 through 3 of this chapter has been willfully violated, in connection with the offering by:

(i) the person filing the registration statement;

(ii) the issuer, any partner, officer, or director of the issuer, any person ccupying a similar status or performing similar functions, or any person irectly or indirectly controlling or controlled by the issuer, but only if the erson filing the registration statement is directly or indirectly controlled by r acting for the issuer; or

(iii) any underwriter;

(c) the security registered or sought to be registered is the subject of a ermanent or temporary injunction of any court of competent jurisdiction ntered under any other federal or state law applicable to the offering, but:

(i) the commissioner may not institute a proceeding against an effective egistration statement under this subsection (c) more than 1 year from the ate of the injunction relied on; and

(ii) he may not enter an order under this subsection (c) on the basis of an njunction entered under any other state law unless that order or injunction as based on facts which would currently constitute a ground for an order nder this section;

(d) the issuer's enterprise or method of business includes or would nclude activities which are illegal where performed;

(e) the offering has worked or tended to work a fraud upon purchasers r would so operate;

(f) when a security is sought to be registered by notification, it is not eliible for such registration;

(g) when a security is sought to be registered by coordination, there has een a failure to comply with the undertaking required by 30-10-204(1)(g);

(h) the applicant or registrant has failed to pay the proper registration ee, but the commissioner may enter only a denial order under this subsecion, and he shall vacate any such order when the deficiency has been corected; or

(i) the offering has been or would be made with unreasonable amounts of nderwriters' and sellers' discounts, commissions, or other compensation, or romoters' profits or participation, or unreasonable amounts or kinds of ptions.

(2) The commissioner may not enter a stop order against an effective egistration statement on the basis of a fact or transaction known to him hen the registration statement became effective.

(3) Upon the entry of an order under subsection (1) of this section, the ommissioner shall promptly notify the issuer of the securities and the appliant or registrant that an order has been entered and of the reasons therefor nd that, if requested by the issuer or registrant within 15 days after the eceipt of the commissioner's notification, the matter will be set promptly own for hearing. If no hearing is requested within 15 days and none is rdered by the commissioner, the order will remain in effect until it is modiied or vacated by the commissioner. If a hearing is requested or ordered, the ommissioner, after notice of and opportunity for hearing, may affirm, nodify, or vacate the order.

History: **En. Sec. 12, Ch. 251, L. 1961; R.C.M. 1947, 15-2012.**

30-10-208. Consent to service of process. (1) Every applicant for egistration as a broker-dealer or investment adviser or salesman under parts

1 through 3 of this chapter and every issuer which proposes to register and offer a security in this state through any person acting on an agency basis in the common-law sense shall file with the commissioner, in such form as he prescribes, an irrevocable consent appointing the commissioner and his successors in office to be the attorney of the applicant to receive service of any lawful process in any noncriminal suit, action, or proceeding against the applicant or its or his successor, executor, or administrator which arises under parts 1 through 3 of this chapter or any rule or order hereunder after the consent has been filed, with the same force and validity as if served personally on the person filing the consent. A person who has filed such a consent in connection with a previous registration need not file another.

(2) Service may be made by leaving a copy of the process in the office of the commissioner, but it is not effective unless:

(a) the plaintiff, who may be the commissioner, in a suit, action, or proceeding instituted by him, forthwith sends notice of the service and a copy of the process by certified or registered mail to the defendant or respondent at its or his last address on file with the commissioner; and

(b) the plaintiff's affidavit of compliance with this section is filed in the case on or before the return day of the process, if any, or within such further time as the court allows.

History: En. Sec. 15, Ch. 251, L. 1961; amd. Sec. 1, Ch. 105, L. 1963; R.C.M. 1947, 15-2015.

30-10-209. Fees. The following fees shall be paid in advance under the provisions of parts 1 through 3 of this chapter:

(1) For the registration of securities by notification or coordination or qualification, there shall be paid to the commissioner for the first year of registration a registration fee of $100 for the first $100,000 of initial issue or portion thereof in this state, based on offering price, plus 1/20 of 1% for any excess over $100,000, with a maximum of $1,000.

(2) Each year thereafter that a registration remains in effect for securities with respect to which reports are required to be filed under 30-10-206(4), an additional registration fee shall be paid to the commissioner to be computed at 1/20 of 1% of the aggregate offering price of such securities which are to be offered in this state during that year, even though the maximum fee was paid the preceding year. In no event shall the additional registration fee be less than $100 or more than $1,000. The registration statement for such securities may be amended to increase the amount of securities to be offered. When an application for registration of securities is denied or withdrawn, the commissioner shall retain the fee.

(3) For filing an annual statement, the fee shall be $10.

(4) For registration of a broker-dealer or investment adviser, the fee shall be $200 for original registration and $200 for each annual renewal thereof. When an application is denied or withdrawn, the commissioner shall retain the fee.

(5) For registration of a salesman, the fee shall be $25 for original registration with each employer and $25 for each annual renewal. When an application is denied or withdrawn, the commissioner shall retain the fee.

(6) For certified copies of any documents filed with the commissioner, the fee shall be the cost to the department.

(7) For a request for an exemption or exception to the provisions of this hapter, the fee shall be $25.

History: En. Sec. 16, Ch. 251, L. 1961; amd. Sec. 1, Ch. 242, L. 1977; R.C.M. 1947, 15-2016.

30-10-210. Examination costs. (1) Any issuer or broker-dealer who is vestigated or examined in connection with a registration under parts 1 rough 3 of this chapter shall reimburse the commissioner or any of his duly uthorized agents, officers, or employees for actual travel expenses, a reason-ble living expense allowance, and a per diem as compensation of examiners, s necessarily incurred on account of the examination, all at reasonable rates ustomary therefor and as established and adopted by the commissioner pon July 1, 1961, and annually thereafter upon presentation of a detailed ccount of such charges and expenses by the commissioner or pursuant to his ritten authorization. No person shall pay and no examiner shall accept any dditional emolument on account of any such examination.

(2) The commissioner shall pay to the state treasurer to the credit of the eneral fund all moneys received hereunder. The commissioner may give ritten authorization for payment of the examination costs referred to in bsection (1) by the person examined directly to the examiner.

(3) If any issuer or broker-dealer fails to pay the charges and expenses eferred to above, the same shall be paid out of the funds of the commis-ioner in the same manner as other disbursements of such funds. The mount so paid shall be a first lien upon all of the assets and property in his state of such issuer or broker-dealer and may be recovered by suit by he attorney general on behalf of the state of Montana and restored to the ppropriate fund. Failure of such issuer or broker-dealer to pay such charges nd expenses shall also work a forfeiture of his or its right to do business this state under parts 1 through 3 of this chapter.

History: En. Sec. 24, Ch. 251, L. 1961; amd. Sec. 71, Ch. 147, L. 1963; R.C.M. 1947, 15-2024(2); nd. Sec. 5, Ch. 351, L. 1979.

Part 3

Offenses and Penalties

30-10-301. Prohibited practices. (1) It is unlawful for any person, in onnection with the offer, sale, or purchase of any security, directly or indi-ectly, to:

(a) employ any device, scheme, or artifice to defraud;

(b) make any untrue statement of a material fact or omit to state a mate-ial fact necessary in order to make the statements made, in the light of the ircumstances under which they are made, not misleading; or

(c) engage in any act, practice, or course of business which operates or ould operate as a fraud or deceit upon any person.

(2) It is unlawful for any person who receives any consideration from nother person primarily for advising the other person as to the value of ecurities or their purchase or sale, whether through the issuance of analysis r reports or otherwise, to:

(a) employ any device, scheme, or artifice to defraud the other person; or

(b) engage in any act, practice, or course of business which operates or ould operate as a fraud or deceit upon the other person.

(3) It is unlawful for any investment adviser to enter into, extend, or renew any investment advisory contract unless it provides that:

(a) the investment adviser shall not be compensated on the basis of a share of capital gains upon or capital appreciation of the funds or any portion of the funds of the client;

(b) no assignment of the contract may be made by the investment adviser without the consent of the other party to the contract; and

(c) the investment adviser, if a partnership, shall notify the other party to the contract of any change in the membership of the partnership within a reasonable time after the change. Subsection (a) does not prohibit an investment advisory contract which provides for compensation based upon the total value of a fund averaged over a definite period or as of definite dates or taken as of a definite date. "Assignment", as used in subsection (b), includes any direct or indirect transfer or hypothecation of an investment advisory contract by the assignor or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor; but if the investment adviser is a partnership, no assignment of an investment advisory contract is considered to result from the death or withdrawal of a minority of the members of the investment adviser having only a minority interest in the business of the investment adviser or from the admission to the investment adviser of one or more members who, after admission, will be only a minority of the members and will have only a minority interest in the business.

History: En. Sec. 5, Ch. 251, L. 1961; R.C.M. 1947, 15-2005.

30-10-302. Misleading filings. It is unlawful for any person to knowingly make or cause to be made, in any document filed with the commissioner or in any proceeding under parts 1 through 3 of this chapter, any statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in any material respect.

History: En. Sec. 17, Ch. 251, L. 1961; R.C.M. 1947, 15-2017.

30-10-303. Unlawful representation concerning registration or exemption. Neither the fact that an application for registration under 30-10-201(4) or a registration statement under 30-10-203, 30-10-204, or 30-10-205 has been filed nor the fact that a person or security is effectively registered constitutes a finding by the commissioner that any document filed under parts 1 through 3 of this chapter is true, complete, and not misleading. Neither any such fact nor the fact that an exemption or exception is available for a security or a transaction means that the commissioner has passed in any way upon the merits of qualifications of, or recommended or given approval to, any person, security, or transaction. It is unlawful to make or cause to be made to any prospective purchaser, customer, or client any representation inconsistent with this section.

History: En. Sec. 18, Ch. 251, L. 1961; R.C.M. 1947, 15-2018; amd. Sec. 6, Ch. 351, L. 1979.

30-10-304. Investigations and subpoenas. (1) The commissioner in his discretion may:

(a) make such public or private investigations or examinations within or without this state as he deems necessary to determine whether any registration should be granted, denied, or revoked or whether any person has violated or is about to violate any provision of parts 1 through 3 of this chapter any rule or order hereunder or to aid in the enforcement of parts 1 rough 3 of this chapter or in the prescribing of rules and forms hereunder;

(b) require or permit any person to file a statement in writing, under oath otherwise as the commissioner may determine, as to all the facts and cirmstances concerning the matter to be investigated; and

(c) publish information concerning any violation of parts 1 through 3 of is chapter or any rule or order hereunder.

(2) For the purpose of any investigation or proceeding under parts 1 rough 3 of this chapter, the commissioner or any officer designated by him ay administer oaths and affirmations, subpoena witnesses, compel their tendance, take evidence, and require the production of any books, papers, rrespondence, memoranda, agreements, or other documents or records ich the commissioner deems relevant or material to the inquiry.

(3) In case of contumacy by or refusal to obey a subpoena issued to any rson, any court of competent jurisdiction, upon application by the commisoner, may issue to that person an order requiring him to appear before the mmissioner or the officer designated by him, there to produce documentary idence if so ordered or to give evidence touching the matter under investition or in question. Any failure to obey the order of the court may be punhed by the court as a contempt of court.

(4) No person is excused from attending and testifying or from producing y document or record before the commissioner or in obedience to the subena of the commissioner or any officer designated by him, or in any proeding instituted by the commissioner, on the ground that the testimony or idence (documentary or otherwise) required of him may tend to incrimiate him or subject him to a penalty or forfeiture; but no individual may be osecuted or subjected to any penalty or forfeiture for or on account of any ansaction, matter, or thing concerning which he is compelled, after claiming s privilege against self-incrimination, to testify or produce evidence (docuentary or otherwise), except that the individual so testifying shall not be empt from prosecution and punishment for perjury committed in so testiing.

History: En. Sec. 19, Ch. 251, L. 1961; R.C.M. 1947, 15-2019.

30-10-305. Injunctions and other remedies. (1) Whenever it pears to the commissioner that any person has engaged or is about to gage in any act or practice constituting a violation of any provision of parts through 3 of this chapter or any rule or order hereunder, he may in his iscretion:

(a) issue an order directing the person to cease and desist from continug the act or practice after reasonable notice and opportunity for a hearing. he commissioner may issue a temporary order pending the hearing that mains in effect until 10 days after any hearing is held or that becomes final the person to whom notice is addressed does not request a hearing within 5 days after receipt of the notice; or

(b) without the issuance of a cease and desist order, bring an action in y court of competent jurisdiction to enjoin any such acts or practices and enforce compliance with parts 1 through 3 of this chapter or any rule or rder hereunder. Upon a proper showing, a permanent or temporary injuncon, restraining order, or writ of mandamus shall be granted and a receiver or conservator may be appointed for the defendant or the defendant's asset The commissioner may not be required to post a bond. If the commission prevails, he is entitled to reasonable attorneys' fees as fixed by the court.

(2) A final judgment or decree, criminal or civil, determining that person has violated parts 1 through 3 of this chapter in an action brough by the commissioner for such violation, other than a consent judgment decree entered before trial, is prima facie evidence against that person in a action brought against him under 30-10-307.

History: En. Sec. 20, Ch. 251, L. 1961; R.C.M. 1947, 15-2020; amd. Sec. 7, Ch. 351, L. 1979.

30-10-306. Criminal liabilities. (1) Any person who willfully violate any provision of parts 1 through 3 of this chapter except 30-10-302, wh willfully violates any rule or order under parts 1 through 3 of this chapte or who willfully violates 30-10-302 knowing the statement made to be fals or misleading in any material respect shall upon conviction be fined not mor than $5,000 or imprisoned not more than 3 years, or both; however, in th event the person so convicted has been previously convicted of a felony i any way involving securities, imprisonment hereunder for not less than 1 yea shall be mandatory. No indictment or information may be returned unde parts 1 through 3 of this chapter more than 5 years after the alleged violation.

(2) The commissioner may refer such evidence as may be available concerning violations of parts 1 through 3 of this chapter or of any rule or orde hereunder to the attorney general or the proper prosecuting attorney, wh may in his discretion, with or without such a reference, institute the appropriate criminal proceedings under parts 1 through 3 of this chapter.

(3) Nothing in parts 1 through 3 of this chapter limits the power of th state to punish any person for any conduct which constitutes a crime.

History: En. Sec. 21, Ch. 251, L. 1961; R.C.M. 1947, 15-2021.

30-10-307. Civil liabilities. (1) Any person who offers or sells a security in violation of any provisions of 30-10-202 through 30-10-205 or offers o sells a security by means of fraud or misrepresentation is liable to the perso buying the security from him, who may sue either at law or in equity t recover the consideration paid for the security, together with interest at 6% per annum from the date of payment, costs, and reasonable attorneys' fees less the amount of any income received on the security, upon the tender o the security, or for damages if he no longer owns the security. Damages ar the amount that would be recoverable upon a tender less:

(a) the value of the security when the buyer disposed of it; and

(b) interest at 6% per annum from the date of disposition.

(2) Every person who directly or indirectly controls a seller liable unde subsection (1), every partner, officer, or director (or person occupying a similar status or performing similar functions) or employee of such a seller, an every broker-dealer or salesman who participates or materially aids in th sale is liable jointly and severally with and to the same extent as the selle if the nonseller knew, or in the exercise of reasonable care could have known of the existence of the facts by reason of which the liability is alleged t exist. There shall be contribution among the several persons so liable.

(3) Any tender specified in this section may be made at any time befor entry of judgment. A cause of action under this statute survives the deat

any person who might have been a plaintiff or a defendant. No person ay sue under this section:

(a) if the buyer has received a written offer, at a time when he owned the curity, to refund the consideration paid, together with interest at 6% per nnum from the date of payment, less the amount of any income received n the security and he failed to accept the offer within 30 days of its receipt;

(b) if the buyer has received a written offer at a time when he did not wn the security in the amount that would be recoverable under subsection) upon a tender less:

(i) the value of the security when the buyer disposed of it; and

(ii) interest at 6% per annum from the date of disposition.

(4) No person who has made or engaged in the performance of any con-act in violation of any provision of parts 1 through 3 of this chapter or any ule or order hereunder or who has acquired any purported right under any uch contract with knowledge of the facts by reason of which its making or erformance was in violation may base any suit on the contract. Any condion, stipulation, or provision binding any person acquiring any security to aive compliance with any provision of parts 1 through 3 of this chapter or ny rule or order hereunder is void as against public policy and in the public nterest.

History: **En. Sec. 22, Ch. 251, L. 1961; amd. Sec. 1, Ch. 213, L. 1967; R.C.M. 1947, 15-2022.**

30-10-308. Judicial review of orders. Any person aggrieved by a nal order of the commissioner may obtain a review of the order in any court f competent jurisdiction by filing in court, within 60 days after the entry of he order, a written petition praying that the order be modified or set aside n whole or in part. A copy of the petition shall be forthwith served upon he commissioner, and thereupon the commissioner shall certify and file in ourt a copy of the filing, testimony, and other evidence upon which the rder was entered. When these have been filed, the court has exclusive jurisiction to affirm, modify, enforce, or set aside the order, in whole or in part. The findings of the commissioner as to the facts, if supported by creditable vidence, are conclusive, unless appealed from. If either party applies to the ourt for leave to adduce additional evidence and shows to the satisfaction f the court that the additional evidence is material and that there were easonable grounds for failure to adduce the evidence in the hearing before he commissioner, the court may order the taking of additional evidence in uch manner and upon such conditions as the court may consider proper. The commencement of proceedings under this section does not, unless speifically ordered by the court, operate as a stay of the commissioner's order.

History: **En. Sec. 23, Ch. 251, L. 1961; R.C.M. 1947, 15-2023.**

Part 4

Fiduciary Security Transfers

30-10-401. Short title. This part may be cited as the "Uniform Act for he Simplification of Fiduciary Security Transfers".

History: **En. Sec. 11, Ch. 101, L. 1963; R.C.M. 1947, 15-662.**

30-10-402. Definitions. In this part, unless the context otherwis requires, the following definitions apply:

(1) "Assignment" includes any written stock power, bond power, bill sale, deed, declaration of trust, or other instrument of transfer.

(2) "Claim of beneficial interest" includes a claim of any interest by decedent's legatee, distributee, heir, or creditor, a beneficiary under a trus a ward, a beneficial owner of a security registered in the name of a nomine or a minor owner of a security registered in the name of a custodian, or claim of any similar interest, whether the claim is asserted by the claiman or by a fiduciary or by any other authorized person on his behalf an includes a claim that the transfer would be in breach of fiduciary duties.

(3) "Corporation" means a private or public corporation, association, trust issuing a security.

(4) "Fiduciary" means an executor, administrator, trustee, guardian, committee, conservator, curator, tutor, custodian, or nominee.

(5) "Person" includes an individual, a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership o association, two or more persons having a joint or common interest, or an other legal or commercial entity.

(6) "Security" includes any share of stock, bond, debenture, note, or othe security issued by a corporation which is registered as to ownership on th books of the corporation.

(7) "Transfer" means a change on the books of a corporation in the registered ownership of a security.

(8) "Transfer agent" means a person employed or authorized by a corporation to transfer securities issued by the corporation.

History: **En. Sec. 1, Ch. 101, L. 1963; R.C.M. 1947, 15-652.**

30-10-403. Registration in the name of fiduciary. A corporatio or transfer agent registering a security in the name of a person who is a fiduciary or who is described as a fiduciary is not bound to inquire into the existence, extent, or correct description of the fiduciary relationship, an thereafter the corporation and its transfer agent may assume without inquir that the newly registered owner continues to be the fiduciary until the corporation or transfer agent receives written notice that the fiduciary is no longe acting as such with respect to the particular security.

History: **En. Sec. 2, Ch. 101, L. 1963; R.C.M. 1947, 15-653.**

30-10-404. Assignment by fiduciary. Except as otherwise provide in this part, a corporation or transfer agent making a transfer of a securit pursuant to an assignment by a fiduciary:

(1) may assume without inquiry that the assignment, even though to th fiduciary himself or to his nominee, is within his authority and capacity an is not in breach of his fiduciary duties;

(2) may assume without inquiry that the fiduciary has complied with an controlling instrument and with the law of the jurisdiction governing th fiduciary relationship, including any law requiring the fiduciary to obtai court approval of the transfer; and

(3) is not charged with notice of and is not bound to obtain or examine any court record or any recorded or unrecorded document relating to th

luciary relationship or the assignment, even though the record or document in its possession.

History: En. Sec. 3, Ch. 101, L. 1963; R.C.M. 1947, 15-654.

30-10-405. Evidence of appointment or incumbency. A corpora- on or transfer agent making a transfer pursuant to an assignment by a fidu- ary who is not the registered owner shall obtain the following evidence of pointment or incumbency:

(1) in the case of a fiduciary appointed or qualified by a court, a certifi- te issued by or under the direction or supervision of that court or an offi- r thereof and dated within 60 days before the transfer; or

(2) in any other case, a copy of a document showing the appointment or certificate issued by or on behalf of a person reasonably believed by the rporation or transfer agent to be responsible or, in the absence of such a ocument or certificate, other evidence reasonably deemed by the corporation transfer agent to be appropriate. Corporations and transfer agents may lopt standards with respect to evidence of appointment or incumbency nder this subsection provided such standards are not manifestly unreason- le. Neither the corporation nor transfer agent is charged with notice of the ontents of any document obtained pursuant to this subsection (2) except to e extent that the contents relate directly to the appointment or incum- ency.

History: En. Sec. 4, Ch. 101, L. 1963; R.C.M. 1947, 15-655.

30-10-406. Adverse claims. (1) A person asserting a claim of benefi- al interest adverse to the transfer of a security pursuant to an assignment y a fiduciary may give the corporation or transfer agent written notice of e claim. The corporation or transfer agent is not put on notice unless the ritten notice identifies the claimant, the registered owner, and the issue of hich the security is a part, provides an address for communications directed the claimant and is received before the transfer. Nothing in this part elieves the corporation or transfer agent of any liability for making or refus- g to make the transfer after it is so put on notice, unless it proceeds in the anner authorized in subsection (2).

(2) As soon as practicable after the presentation of a security for transfer ursuant to an assignment by a fiduciary, a corporation or transfer agent hich has received notice of a claim of beneficial interest adverse to the ansfer may send notice of the presentation by registered or certified mail the claimant at the address given by him. If the corporation or transfer gent so mails such a notice it shall withhold the transfer for 30 days after e mailing and shall then make the transfer unless restrained by a court rder.

History: En. Sec. 5, Ch. 101, L. 1963; R.C.M. 1947, 15-656.

30-10-407. Nonliability of corporation and transfer agent. A orporation or transfer agent incurs no liability to any person by making a ransfer or otherwise acting in a manner authorized by this part.

History: En. Sec. 6, Ch. 101, L. 1963; R.C.M. 1947, 15-657.

30-10-408. Nonliability of third persons. (1) No person who par- icipates in the acquisition, disposition, assignment, or transfer of a security by or to a fiduciary, including a person who guarantees the signature of the fiduciary, is liable for participation in any breach of fiduciary duty by reason of failure to inquire whether the transaction involves a breach unless it is shown that he acted with actual knowledge that the proceeds of the transaction were being or were to be used wrongfully for the individual benefit of the fiduciary or that the transaction was otherwise in breach of duty.

(2) If a corporation or transfer agent makes a transfer pursuant to an assignment by a fiduciary, a person who guaranteed the signature of the fiduciary is not liable on the guarantee to any person to whom the corporation or transfer agent by reason of this part incurs no liability.

(3) This section does not impose any liability upon the corporation or its transfer agent.

History: En. Sec. 7, Ch. 101, L. 1963; R.C.M. 1947, 15-658.

30-10-409. Territorial application. (1) The rights and duties of a corporation and its transfer agents in registering a security in the name of a fiduciary or in making a transfer of a security pursuant to an assignment by a fiduciary are governed by the law of the jurisdiction under whose laws the corporation is organized.

(2) This part applies to the rights and duties of a person other than the corporation and its transfer agents with regard to acts and omissions in this state in connection with the acquisition, disposition, assignment, or transfer of a security by or to a fiduciary and of a person who guarantees in this state the signature of a fiduciary in connection with such a transaction.

History: En. Sec. 8, Ch. 101, L. 1963; R.C.M. 1947, 15-659.

30-10-410. Tax obligations. This part does not affect any obligation of a corporation or transfer agent with respect to estate, inheritance, succession, or other taxes imposed by the laws of this state.

History: En. Sec. 9, Ch. 101, L. 1963; R.C.M. 1947, 15-660.

30-10-411. Uniformity of interpretation. This part shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

History: En. Sec. 10, Ch. 101, L. 1963; R.C.M. 1947, 15-661.

CHAPTER 11

SALES

Part 1 — Sales and Exchanges

Section

30-11-101. Sale defined.
30-11-102. Subject of sale.
30-11-103. Agreement for sale.
30-11-104. Agreement to sell.
30-11-105. Agreement to buy.
30-11-106. Agreement to sell and buy.
30-11-107. What may be the subject of the contract.
30-11-108. Agreement to sell real property.
30-11-109. Usual common-law covenants required by such contracts, when.
30-11-110. Form of covenants.

-11-111. Contract for sale of real property.
-11-112. Exchange defined.
-11-113. Sale equivalent to exchange.
-11-114. Warranty of money.
-11-115. Uniform Commercial Code overrides.

Part 2 — Seller's Responsibilities

-11-201. When a seller must act as a depositary.
-11-202. When seller may resell.
-11-203. Delivery on demand.
-11-204. Delivery — where made.
-11-205. Expense of transportation.
-11-206. Notice of election as to delivery.
0-11-207. Transportation.
0-11-208. Delivery to be within reasonable hours.
0-11-209. Warranty defined.
0-11-210. No implied warranty in mere contract of sale.
0-11-211. Warranty of title to personal property.
0-11-212. Warranty on sale by sample.
0-11-213. Warranty when seller knows that buyer relies on his statements.
0-11-214. Warranty when merchandise not in existence.
0-11-215. Manufacturer's warranty against latent defects.
0-11-216. Warranty of fitness for particular purpose.
0-11-217. Warranty when thing cannot be examined by buyer.
0-11-218. Warranty that trademark is genuine.
0-11-219. Warranty of truth of other marks.
0-11-220. Warranty on sale of written instrument.
0-11-221. Warranty on sale of goodwill.
0-11-222. Warranty upon judicial sale.
0-11-223. Effect of general warranty.
0-11-224. Uniform Commercial Code overrides.

Part 3 — Merchant's Rights

0-11-301. Definitions.
0-11-302. Obligation to keep merchandise in full view.

Part 4 — Commission Merchants

0-11-401. Commission merchants to acknowledge receipt of property.
0-11-402. Statement to consignor on sale of property.
0-11-403. Penalties for violation.

Part 5 — Auction Sales and Auctioneers

0-11-501. Sale by auction defined.
0-11-502. Sale by auction.
0-11-503. Sale under written conditions.
0-11-504. Auctioneer's memorandum of sale.
0-11-505. Book of sales.
0-11-506. Auctioneer's authority from the seller.
0-11-507. Auctioneer's authority from the bidder.
0-11-508. Auctioneer — authority and bond.
0-11-509. Reciprocal privileges to nonresident auctioneers.
0-11-510. Bond and sureties — approval — filing.
0-11-511. Auctioneers ex officio.
0-11-512. Assistant — who may act and when.
0-11-513. Auctioneers to designate one place of business — partners.
0-11-514. Penalty.
0-11-515. Enforcement.
0-11-516. Powers of cities and towns.

Part 6 — Factors

30-11-601. Factor defined.
30-11-602. Obedience required from factor.
30-11-603. Sales on credit.
30-11-604. Liability of factor under guaranty commission.
30-11-605. Principal's consent needed to relieve factor from liability.
30-11-606. Authority of factor.
30-11-607. Ostensible authority.

Part 1

Sales and Exchanges

30-11-101. Sale defined. Sale is a contract by which, for a pecuniary consideration called a price, one transfers to another an interest in property.

History: En. Sec. 2310, Civ. C. 1895; re-en. Sec. 5079, Rev. C. 1907; re-en. Sec. 7581, R.C.M 1921; Cal. Civ. C. Sec. 1721; Field Civ. C. Sec. 855; re-en. Sec. 7581, R.C.M. 1935; R.C.M. 1947 74-101.

30-11-102. Subject of sale. The subject of sale must be property, the title to which can be immediately transferred from the seller to the buyer.

History: En. Sec. 2311, Civ. C. 1895; re-en. Sec. 5080, Rev. C. 1907; re-en. Sec. 7582, R.C.M 1921; Cal. Civ. C. Sec. 1722; Field Civ. C. Sec. 856; re-en. Sec. 7582, R.C.M. 1935; R.C.M. 1947 74-102.

30-11-103. Agreement for sale. An agreement for sale is either:

(1) an agreement to sell;
(2) an agreement to buy; or
(3) a mutual agreement to sell and buy.

History: En. Sec. 2320, Civ. C. 1895; re-en. Sec. 5081, Rev. C. 1907; re-en. Sec. 7583, R.C.M. 1921; Cal. Civ. C. Sec. 1726; Field Civ. C. Sec. 857; re-en. Sec. 7583, R.C.M. 1935; R.C.M. 1947, 74-103.

30-11-104. Agreement to sell. An agreement to sell is a contract by which one engages, for a price, to transfer to another the title to a certain thing.

History: En. Sec. 2321, Civ. C. 1895; re-en. Sec. 5082, Rev. C. 1907; re-en. Sec. 7584, R.C.M. 1921; Cal. Civ. C. Sec. 1727; Field Civ. C. Sec. 858; re-en. Sec. 7584, R.C.M. 1935; R.C.M. 1947, 74-104.

30-11-105. Agreement to buy. An agreement to buy is a contract by which one engages to accept from another and pay a price for the title to a certain thing.

History: En. Sec. 2322, Civ. C. 1895; re-en. Sec. 5083, Rev. C. 1907; re-en. Sec. 7585, R.C.M. 1921; Cal. Civ. C. Sec. 1728; Field Civ. C. Sec. 859; re-en. Sec. 7585, R.C.M. 1935; R.C.M. 1947, 74-105.

30-11-106. Agreement to sell and buy. An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor.

History: En. Sec. 2323, Civ. C. 1895; re-en. Sec. 5084, Rev. C. 1907; re-en. Sec. 7586, R.C.M. 1921; Cal. Civ. C. Sec. 1729; Field Civ. C. Sec. 860; re-en. Sec. 7586, R.C.M. 1935; R.C.M. 1947, 74-106.

30-11-107. What may be the subject of the contract. Any property which, if in existence, might be the subject of sale may be the subject of an agreement for sale, whether in existence or not.

History: En. Sec. 2324, Civ. C. 1895; re-en. Sec. 5085, Rev. C. 1907; re-en. Sec. 7587, R.C.M. 1921; Cal. Civ. C. Sec. 1730; Field Civ. C. Sec. 861; re-en. Sec. 7587, R.C.M. 1935; R.C.M. 1947, 74-107.

30-11-108. Agreement to sell real property. An agreement to sell real property binds the seller to execute a conveyance in form sufficient to pass the title to the property.

History: En. Sec. 2325, Civ. C. 1895; re-en. Sec. 5086, Rev. C. 1907; re-en. Sec. 7588, R.C.M. 1921; Cal. Civ. C. Sec. 1731; Based on Field Civ. C. Sec. 862; re-en. Sec. 7588, R.C.M. 1935; R.C.M. 1947, 74-108.

30-11-109. Usual common-law covenants required by such contracts, when. An agreement on the part of a seller of real property to give the usual covenants binds him to insert in the grant covenants of "seisin", "quiet enjoyment", "further assurance", "general warranty", and "against encumbrances".

History: En. Sec. 2326, Civ. C. 1895; re-en. Sec. 5087, Rev. C. 1907; re-en. Sec. 7589, R.C.M. 1921; Cal. Civ. C. Sec. 1733; Field Civ. C. Sec. 863; re-en. Sec. 7589, R.C.M. 1935; R.C.M. 1947, 74-109.

30-11-110. Form of covenants. The covenants mentioned in 30-11-109 must be in substance as follows:

"The party of the first part covenants with the party of the second part that the former is now seized in fee simple of the property granted; that the latter shall enjoy the same without any lawful disturbance; that the same is free from all encumbrances; that the party of the first part and all persons acquiring any interest in the same through or for him will, on demand, execute and deliver to the party of the second part, at the expense of the latter, any further assurance of the same that may be reasonably required; and that the party of the first part will warrant to the party of the second part all the said property against every person lawfully claiming the same."

History: En. Sec. 2327, Civ. C. 1895; re-en. Sec. 5088, Rev. C. 1907; re-en. Sec. 7590, R.C.M. 1921; Cal. Civ. C. Sec. 1734; Field Civ. C. Sec. 864; re-en. Sec. 7590, R.C.M. 1935; R.C.M. 1947, 74-110.

30-11-111. Contract for sale of real property. No agreement for the sale of real property or of any interest therein is valid unless the same, or some note or memorandum thereof, be in writing and subscribed by the party to be charged or his agent thereunto authorized in writing; but this does not abridge the power of any court to compel the specific performance of any agreement for the sale of real property in case of part performance thereof.

History: En. Sec. 2342, Civ. C. 1895; re-en. Sec. 5091, Rev. C. 1907; re-en. Sec. 7593, R.C.M. 1921; Cal. Civ. C. Sec. 1741; Based on Field Civ. C. Sec. 867; re-en. Sec. 7593, R.C.M. 1935; R.C.M. 1947, 74-203.

30-11-112. Exchange defined. Exchange is a contract by which the parties mutually give or agree to give one thing for another, neither thing nor both things being money only.

History: En. Sec. 2430, Civ. C. 1895; re-en. Sec. 5129, Rev. C. 1907; re-en. Sec. 7632, R.C.M. 1921; Cal. Civ. C. Sec. 1804; Field Civ. C. Sec. 903; re-en. Sec. 7632, R.C.M. 1935; R.C.M. 1947, 74-501.

30-11-113. Sale equivalent to exchange. The provisions of the sections on sale apply to exchanges. Each party has the rights and obligations of a seller as to the thing which he gives and of a buyer as to that which he takes.

History: En. Sec. 2432, Civ. C. 1895; re-en. Sec. 5131, Rev. C. 1907; re-en. Sec. 7634, R.C.M. 1921; Cal. Civ. C. Sec. 1806; Field Civ. C. Sec. 905; re-en. Sec. 7634, R.C.M. 1935; R.C.M. 1947, 74-503.

30-11-114. Warranty of money. On an exchange of money, each party thereby warrants the genuineness of the money given by him.

History: En. Sec. 2433, Civ. C. 1895; re-en. Sec. 5132, Rev. C. 1907; re-en. Sec. 7635, R.C.M. 1921; Cal. Civ. C. Sec. 1807; Field Civ. C. Sec. 906; re-en. Sec. 7635, R.C.M. 1935; R.C.M. 1947, 74-504.

30-11-115. Uniform Commercial Code overrides. The provisions of this part do not apply to exchanges subject to the Uniform Commercial Code.

History: En. 74-505 by Sec. 11-151, Ch. 264, L. 1963; R.C.M. 1947, 74-505; amd. Sec. 5, Ch. 137, L. 1979.

Part 2

Seller's Responsibilities

30-11-201. When a seller must act as a depositary. After personal property has been sold and until the delivery is completed, the seller has the rights and obligations of a depositary for hire, except that he must keep the property, without charge, until the buyer has had a reasonable opportunity to remove it.

History: En. Sec. 2350, Civ. C. 1895; re-en. Sec. 5095, Rev. C. 1907; re-en. Sec. 7598, R.C.M. 1921; Cal. Civ. C. Sec. 1748; Field Civ. C. Sec. 869; re-en. Sec. 7598; R.C.M. 1935; R.C.M. 1947, 74-301.

30-11-202. When seller may resell. If a buyer of personal property does not pay for it according to contract and it remains in the possession of the seller after payment is due, the seller may rescind the sale, or may enforce his lien for the price, in the manner prescribed by the law on liens.

History: En. Sec. 2351, Civ. C. 1895; re-en. Sec. 5096, Rev. C. 1907; re-en. Sec. 7599, R.C.M. 1921; Cal. Civ. C. Sec. 1749; Field Civ. C. Sec. 870; re-en. Sec. 7599, R.C.M. 1935; R.C.M. 1947, 74-302.

30-11-203. Delivery on demand. One who sells personal property, whether it was in his possession at the time of sale or not, must put it into a condition fit for delivery and deliver it to the buyer within a reasonable time after demand, unless he has a lien thereon.

History: En. Sec. 2360, Civ. C. 1895; re-en. Sec. 5097, Rev. C. 1907; re-en. Sec. 7600, R.C.M. 1921; Cal. Civ. C. Sec. 1753; Field Civ. C. Sec. 871; re-en. Sec. 7600, R.C.M. 1935; R.C.M. 1947, 74-303.

30-11-204. Delivery — where made. Personal property sold is deliverable at the place where it is at the time of the sale or agreement to sell, or if it is not then in existence, it is deliverable at the place where it is produced.

History: En. Sec. 2361, Civ. C. 1895; re-en. Sec. 5098, Rev. C. 1907; re-en. Sec. 7601, R.C.M. 1921; Cal. Civ. C. Sec. 1754; Field Civ. C. Sec. 872; re-en. Sec. 7601, R.C.M. 1935; R.C.M. 1947, 74-304.

30-11-205. Expense of transportation. One who sells personal proprty must bring it to his own door or other convenient place for its accepance by the buyer, but further transportation is at the risk and expense of he buyer.

History: En. Sec. 2362, Civ. C. 1895; re-en. Sec. 5099, Rev. C. 1907; re-en. Sec. 7602, R.C.M. 921; Cal. Civ. C. Sec. 1755; Field Civ. C. Sec. 873; re-en. Sec. 7602, R.C.M. 1935; R.C.M. 1947, 4-305.

30-11-206. Notice of election as to delivery. When either party to contract of sale has an option as to the time, place, or manner of delivery, e must give the other party reasonable notice of his choice; and if he does ot give such notice within a reasonable time, his right of option is waived.

History: En. Sec. 2363, Civ. C. 1895; re-en. Sec. 5100, Rev. C. 1907; re-en. Sec. 7603, R.C.M. 921; Cal. Civ. C. Sec. 1756; Field Civ. C. Sec. 874; re-en. Sec. 7603, R.C.M. 1935; R.C.M. 1947, 4-306.

30-11-207. Transportation. If a seller agrees to send the thing sold to he buyer, he must follow the directions of the latter as to the manner of ending or it will be at his own risk during its transportation. If he follows uch directions or if, in the absence of special directions, he uses ordinary are in forwarding the thing, it is at the risk of the buyer.

History: En. Sec. 2364, Civ. C. 1895; re-en. Sec. 5101, Rev. C. 1907; re-en. Sec. 7604, R.C.M. 921; Cal. Civ. C. Sec. 1757; Field Civ. C. Sec. 875; re-en. Sec. 7604, R.C.M. 1935; R.C.M. 1947, 4-307.

30-11-208. Delivery to be within reasonable hours. The delivery f a thing sold can be offered or demanded only within reasonable hours of he day.

History: En. Sec. 2365, Civ. C. 1895; re-en. Sec. 5102, Rev. C. 1907; re-en. Sec. 7605, R.C.M. 921; Cal. Civ. C. Sec. 1758; Field Civ. C. Sec. 876; re-en. Sec. 7605, R.C.M. 1935; R.C.M. 1947, 4-308.

30-11-209. Warranty defined. A warranty is an engagement by which seller assures to a buyer the existence of some fact affecting the transction, whether past, present, or future.

History: En. Sec. 2370, Civ. C. 1895; re-en. Sec. 5103, Rev. C. 1907; re-en. Sec. 7606, R.C.M. 921; Cal. Civ. C. Sec. 1763; Field Civ. C. Sec. 877; re-en. Sec. 7606, R.C.M. 1935; R.C.M. 1947, 4-309.

30-11-210. No implied warranty in mere contract of sale. Except as prescribed by this part, a mere contract of sale or agreement to ell does not imply a warranty.

History: En. Sec. 2371, Civ. C. 1895; re-en. Sec. 5104, Rev. C. 1907; re-en. Sec. 7607, R.C.M. 921; Cal. Civ. C. Sec. 1764; Field Civ. C. Sec. 878; re-en. Sec. 7607, R.C.M. 1935; R.C.M. 1947, 4-310.

30-11-211. Warranty of title to personal property. One who sells or agrees to sell personal property as his own thereby warrants that he has a good and unencumbered title thereto.

History: En. Sec. 2372, Civ. C. 1895; re-en. Sec. 5105, Rev. C. 1907; re-en. Sec. 7608, R.C.M. 921; Cal. Civ. C. Sec. 1765; Field Civ. C. Sec. 879; re-en. Sec. 7608, R.C.M. 1935; R.C.M. 1947, 4-311.

30-11-212. Warranty on sale by sample. One who sells or agrees to sell goods by sample thereby warrants the bulk to be equal to the sample.

History: En. Sec. 2373, Civ. C. 1895; re-en. Sec. 5106, Rev. C. 1907; re-en. Sec. 7609, R.C.M. 1921; Cal. Civ. C. Sec. 1766; Field Civ. C. Sec. 880; re-en. Sec. 7609, R.C.M. 1935; R.C.M. 1947, 74-312.

30-11-213. Warranty when seller knows that buyer relies on his statements. One who sells or agrees to sell personal property knowing that the buyer relies upon his advice or judgment thereby warrants to the buyer that neither the seller nor any agent employed by him in the transaction knows the existence of any fact concerning the thing sold which would, to his knowledge, destroy the buyer's inducement to buy.

History: En. Sec. 2374, Civ. C. 1895; re-en. Sec. 5107, Rev. C. 1907; re-en. Sec. 7610, R.C.M. 1921; Cal. Civ. C. Sec. 1767; Field Civ. C. Sec. 881; re-en. Sec. 7610, R.C.M. 1935; R.C.M. 1947, 74-313.

30-11-214. Warranty when merchandise not in existence. One who agrees to sell merchandise not then in existence thereby warrants that it shall be sound and merchantable at the place of production contemplated by the parties and as nearly so at the place of delivery as can be secured by reasonable care.

History: En. Sec. 2375, Civ. C. 1895; re-en. Sec. 5108, Rev. C. 1907; re-en. Sec. 7611, R.C.M. 1921; Cal. Civ. C. Sec. 1768; Field Civ. C. Sec. 882; re-en. Sec. 7611, R.C.M. 1935; R.C.M. 1947, 74-314.

30-11-215. Manufacturer's warranty against latent defects. One who sells or agrees to sell an article of his own manufacture thereby warrants it to be free from any latent defect, not disclosed to the buyer, arising from the process of manufacture and also that neither he nor his agent in such manufacture has knowingly used improper materials therein.

History: En. Sec. 2376, Civ. C. 1895; re-en. Sec. 5109, Rev. C. 1907; re-en. Sec. 7612, R.C.M. 1921; Cal. Civ. C. Sec. 1769; Field Civ. C. Sec. 883; re-en. Sec. 7612, R.C.M. 1935; R.C.M. 1947, 74-315.

30-11-216. Warranty of fitness for particular purpose. One who manufactures an article under an order for a particular purpose warrants by the sale that it is reasonably fit for that purpose.

History: En. Sec. 2377, Civ. C. 1895; re-en. Sec. 5110, Rev. C. 1907; re-en. Sec. 7613, R.C.M. 1921; Cal. Civ. C. Sec. 1770; Field Civ. C. Sec. 884; re-en. Sec. 7613, R.C.M. 1935; R.C.M. 1947, 74-316.

30-11-217. Warranty when thing cannot be examined by buyer. One who sells or agrees to sell merchandise inaccessible to the examination of the buyer thereby warrants that it is sound and merchantable.

History: En. Sec. 2378, Civ. C. 1895; re-en. Sec. 5111, Rev. C. 1907; re-en. Sec. 7614, R.C.M. 1921; Cal. Civ. C. Sec. 1771; Field Civ. C. Sec. 885; re-en. Sec. 7614, R.C.M. 1935; R.C.M. 1947, 74-317.

30-11-218. Warranty that trademark is genuine. One who sells or agrees to sell any article to which there is affixed or attached a trademark thereby warrants that trademark to be genuine and lawfully used.

History: En. Sec. 2379, Civ. C. 1895; re-en. Sec. 5112, Rev. C. 1907; re-en. Sec. 7615, R.C.M. 1921; Cal. Civ. C. Sec. 1772; Field Civ. C. Sec. 886; re-en. Sec. 7615, R.C.M. 1935; R.C.M. 1947, 74-318.

30-11-219. Warranty of truth of other marks. One who sells or grees to sell any article to which there is affixed or attached a statement r mark to express the quantity or quality thereof or the place where it was n whole or in part produced, manufactured, or prepared thereby warrants he truth thereof.

History: En. Sec. 2380, Civ. C. 1895; re-en. Sec. 5113, Rev. C. 1907; re-en. Sec. 7616, R.C.M. 921; Cal. Civ. C. Sec. 1773; Field Civ. C. Sec. 887; re-en. Sec. 7616, R.C.M. 1935; R.C.M. 1947, 4-319.

30-11-220. Warranty on sale of written instrument. One who ells or agrees to sell an instrument purporting to bind anyone to the perfor-nance of any act thereby warrants that he has no knowledge of any facts vhich tend to prove it worthless, such as the insolvency of any of the parties hereto where that is material, the extinction of its obligations, or its inva-idity for any cause.

History: En. Sec. 2381, Civ. C. 1895; re-en. Sec. 5114, Rev. C. 1907; re-en. Sec. 7617, R.C.M. 921; Cal. Civ. C. Sec. 1774; Field Civ. C. Sec. 888; re-en. Sec. 7617, R.C.M. 1935; R.C.M. 1947, 4-320.

30-11-221. Warranty on sale of goodwill. One who sells the oodwill of a business thereby warrants that he will not endeavor to draw off ny of the customers.

History: En. Sec. 2383, Civ. C. 1895; re-en. Sec. 5116, Rev. C. 1907; re-en. Sec. 7619, R.C.M. 921; Cal. Civ. C. Sec. 1776; Field Civ. C. Sec. 890; re-en. Sec. 7619, R.C.M. 1935; R.C.M. 1947, 4-322.

30-11-222. Warranty upon judicial sale. Upon a judicial sale, the nly warranty implied is that the seller does not know that the sale will not ass a good title to the property.

History: En. Sec. 2384, Civ. C. 1895; re-en. Sec. 5117, Rev. C. 1907; re-en. Sec. 7620, R.C.M. 921; Cal. Civ. C. Sec. 1777; Field Civ. C. Sec. 891; re-en. Sec. 7620, R.C.M. 1935; R.C.M. 1947, 4-323.

30-11-223. Effect of general warranty. A general warranty does ot extend to defects inconsistent therewith of which the buyer was then ware or which were then easily discernible by him without the exercise of eculiar skill, but it extends to all other defects.

History: En. Sec. 2385, Civ. C. 1895; re-en. Sec. 5118, Rev. C. 1907; re-en. Sec. 7621, R.C.M. 921; Cal. Civ. C. Sec. 1778; Field Civ. C. Sec. 892; re-en. Sec. 7621, R.C.M. 1935; R.C.M. 1947, 4-324.

30-11-224. Uniform Commercial Code overrides. This part shall ot apply to sales subject to the Uniform Commercial Code.

History: En. 74-325 by Sec. 11-150, Ch. 264, L. 1963; R.C.M. 1947, 74-325.

Part 3

Merchant's Rights

30-11-301. Definitions. (1) The term "merchant" as used in this part hall mean an owner or operator and the agent, consignee, employee, lessee, r officer of an owner or operator of any merchant's premises.

(2) The term "premises" shall mean any establishment or part thereof vherein merchandise is displayed, held, or offered for sale.

(3) The term "merchandise" shall mean any personal property capable of manual delivery displayed, held, or offered for sale by a merchant.

History: En. Sec. 1, Ch. 11, L. 1957; R.C.M. 1947, 64-212.

30-11-302. Obligation to keep merchandise in full view. Any merchant shall have the right to request any individual on his premises to place or keep in full view any merchandise such individual may have removed, or which the merchant has reason to believe he may have removed, from its place of display or elsewhere, whether for examination, purchase, or for any other purpose. No merchant shall be criminally or civilly liable for slander, false arrest, or otherwise on account of having made such a request.

History: En. Sec. 2, Ch. 11, L. 1957; R.C.M. 1947, 64-213.

Part 4

Commission Merchants

30-11-401. Commission merchants to acknowledge receipt of property. Any persons doing business in this state as commission merchants or who shall receive from any person of this state agricultural or horticultural products or farm produce raised in this state to sell on commission shall immediately, upon receipt of such goods, send to the consignor or consignors a statement in writing showing what property has been received.

History: En. Sec. 1, Ch. 2, L. 1909; re-en. Sec. 4183, R.C.M. 1921; re-en. Sec. 4183, R.C.M. 1935; R.C.M. 1947, 66-701.

30-11-402. Statement to consignor on sale of property. Whenever any commission merchant or person receiving any property as mentioned in the preceding section shall sell the same or 25% thereof, such commission merchant or person shall immediately render a true statement to the consignor, showing what portion of such consignment has been sold, to whom sold, and the price received therefor.

History: En. Sec. 2, Ch. 2, L. 1909; re-en. Sec. 4184, R.C.M. 1921; re-en. Sec. 4184, R.C.M. 1935; R.C.M. 1947, 66-702.

30-11-403. Penalties for violation. Any person engaged in selling any property as herein specified, who fails or neglects to comply with any of the provisions of 30-11-401 and 30-11-402 or who shall make a false report or statement of the matters herein required, shall be deemed guilty of a misdemeanor and on conviction thereof shall be punished by a fine not exceeding $500 or imprisonment in the county jail not exceeding 6 months or by both such fine and imprisonment.

History: En. Sec. 3, Ch. 2, L. 1909; re-en. Sec. 4185, R.C.M. 1921; re-en. Sec. 4185, R.C.M. 1935; R.C.M. 1947, 66-703.

Part 5

Auction Sales and Auctioneers

30-11-501. Sale by auction defined. A sale by auction is a sale by public outcry to the highest bidder on the spot.

History: En. Sec. 2410, Civ. C. 1895; re-en. Sec. 5122, Rev. C. 1907; re-en. Sec. 7625, R.C.M. 1921; Cal. Civ. C. Sec. 1792; Field Civ. C. Sec. 896; re-en. Sec. 7625, R.C.M. 1935; Sec. 66-213, R.C.M. 1947; redes. 74-701 by Sec. 1, Ch. 263, L. 1977; R.C.M. 1947, 74-701.

30-11-502. Sale by auction. (1) In a sale by auction of goods by lot, ach lot is the subject of a separate sale.

(2) A sale by auction is complete when the auctioneer so announces by he fall of the hammer or other customary manner. Where a bid is made while the hammer is falling in acceptance of a prior bid, the auctioneer may n his discretion reopen the bidding or declare the goods sold under the bid on which the hammer was falling.

(3) Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw he goods at any time until he announces completion of the sale. In an auction without reserve, after the auctioneer calls for bids on an article or lot, hat article or lot cannot be withdrawn unless no bid is made within a easonable time. In either case a bidder may retract his bid until the auctioneer's announcement of completion of the sale, but a bidder's retraction does not revive any previous bid.

(4) If the auctioneer knowingly receives a bid on the seller's behalf or the seller makes or procures such a bid and notice has not been given that liberty for such bidding is reserved, the buyer may at his option avoid the sale or take the goods at the price of the last good faith bid prior to the completion of the sale. This subsection does not apply to any bid at a forced sale.

History: En. Sec. 2-328, Ch. 264, L. 1963; Sec. 87A-2-328, R.C.M. 1947; amd. and redes. 74-702 by Sec. 2, Ch. 263, L. 1977; R.C.M. 1947, 74-702.

30-11-503. Sale under written conditions. When a sale by auction s made upon written or printed conditions, those conditions cannot be modified by any oral declaration of the auctioneer except those for his own protection.

History: En. Sec. 2413, Civ. C. 1895; re-en. Sec. 5125, Rev. C. 1907; re-en. Sec. 7628, R.C.M. 1921; Cal. Civ. C. Sec. 1795; Field Civ. C. Sec. 899; re-en. Sec. 7628, R.C.M. 1935; Sec. 66-216, R.C.M. 1947; amd. and redes. 74-703 by Sec. 3, Ch. 263, L. 1977; R.C.M. 1947, 74-703.

30-11-504. Auctioneer's memorandum of sale. When property is sold by auction, an entry made by the auctioneer in his sale book at the time of the sale specifying the name of the person for whom he sells, the thing sold, the price, the terms of sale, and the name of the buyer binds both the parties in the same manner as if made by themselves.

History: En. Sec. 2416, Civ. C. 1895; re-en. Sec. 5128, Rev. C. 1907; re-en. Sec. 7631, R.C.M. 1921; Cal. Civ. C. Sec. 1798; Field Civ. C. Sec. 902; re-en. Sec 7631, R.C.M. 1935; Sec. 66-219, R.C.M. 1947; amd. and redes. 74-704 by Sec. 4, Ch. 263, L. 1977; R.C.M. 1947, 74-704.

30-11-505. Book of sales. (1) Each auctioneer must keep a book and enter all sales showing the name of the owner of the goods sold, to whom sold, the amount paid, and the date of each sale.

(2) The book must be open for inspection by interested persons during normal business hours.

History: En. Sec. 3424, Pol. C. 1895; re-en. Sec. 2132, Rev. C. 1907; re-en. Sec. 4155, R.C.M. 1921; Cal. Pol. C. Sec. 3306; re-en. Sec. 4155, R.C.M. 1935; Sec. 66-211, R.C.M. 1947; amd. and redes. 74-705 by Sec. 5, Ch. 263, L. 1977; R.C.M. 1947, 74-705.

30-11-506. Auctioneer's authority from the seller. An auctioneer, in the absence of special authority or usage, has authority from the seller only as follows:

(1) to sell by public auction to the highest bidder;
(2) to sell for cash only, except for articles usually sold on credit at auction;
(3) to warrant as an agent pursuant to 28-10-421;
(4) to prescribe reasonable rules and terms of sale;
(5) to deliver the thing sold upon payment of the price;
(6) to collect the price; and
(7) to do whatever else is necessary, proper, and usual in the ordinary course of business for effecting these purposes.

History: En. Sec. 3160, Civ. C. 1895; re-en. Sec. 5461, Rev. C. 1907; re-en. Sec. 7976, R.C.M. 1921; Cal. Civ. C. Sec. 2362; Field Civ. C. Sec. 1264; re-en. Sec. 7976, R.C.M. 1935; Sec. 66-201, R.C.M. 1947; amd. and redes. 74-706 by Sec. 6, Ch. 263, L. 1977; R.C.M. 1947, 74-706.

30-11-507. Auctioneer's authority from the bidder. An auctioneer has authority from a bidder at the auction, as well as from the seller, to bind both by a memorandum of sale as prescribed in 30-11-504.

History: En. Sec. 3161, Civ. C. 1895; re-en. Sec. 5462, Rev. C. 1907; re-en. Sec. 7977, R.C.M. 1921; Cal. Civ. C. Sec. 2363; Field Civ. C. Sec. 1265; re-en. Sec. 7977, R.C.M. 1935; amd. Sec. 11-145, Ch. 264, L. 1963; Sec. 66-202, R.C.M. 1947; amd. and redes. 74-707 by Sec. 7, Ch. 263, L. 1977; R.C.M. 1947, 74-707.

30-11-508. Auctioneer — authority and bond. Any citizen of this state may become an auctioneer and be authorized to sell real or personal property at public auction in any county in this state after giving a bond in accordance with the provisions of this part for the faithful performance of his duties.

History: En. Sec. 3400, Pol. C. 1895; re-en. Sec. 2119, Rev. C. 1907; amd. Sec. 1, Ch. 15, L. 1921; re-en. Sec. 4147, R.C.M. 1921; Cal. Pol. C. Sec. 3284; re-en. Sec. 4147, R.C.M. 1935; Sec. 66-203, R.C.M. 1947; amd. and redes. 74-708 by Sec. 8, Ch. 263, L. 1977; R.C.M. 1947, 74-708.

30-11-509. Reciprocal privileges to nonresident auctioneers. The residency requirements required by this state for an auctioneer are waived for the citizens of any other state to the same extent that the home state of the applicant waives residency requirements for the citizens of this state.

History: En. Sec. 1, Ch. 173, L. 1963; Sec. 66-203.1, R.C.M. 1947; amd. and redes. 74-709 by Sec. 9, Ch. 263, L. 1977; R.C.M. 1947, 74-709.

30-11-510. Bond and sureties — approval — filing. (1) Bond must be payable to the state, with one or more sureties, in the sum of $5,000 and approved by the county clerk of the county in which the auctioneer resides and filed in his office.

(2) If the auctioneer is not a resident, the bond shall be filed with the county clerk of the county of this state in which he carries on his principal auction business.

History: En. Sec. 3401, Pol. C. 1895; re-en. Sec. 2120, Rev. C. 1907; re-en. Sec. 4148, R.C.M. 1921; Cal. Pol. C. Sec. 3285; re-en. Sec. 4148, R.C.M. 1935; amd. Sec. 2, Ch. 173, L. 1963; Sec. 66-204, R.C.M. 1947; amd. and redes. 74-710 by Sec. 10, Ch. 263, L. 1977; R.C.M. 1947, 74-710.

30-11-511. Auctioneers ex officio. (1) In any county without an auctioneer, the sheriff or a constable thereof is ex officio auctioneer and is permitted to sell any property at public auction.

(2) He is liable on his official bond for any delinquency as the ex officio uctioneer.

History: En. Sec. 3407, Pol. C. 1895; re-en. Sec. 2126, Rev. C. 1907; re-en. Sec. 4149, R.C.M. 21; Cal. Pol. C. Sec. 3291; re-en. Sec. 4149, R.C.M. 1935; amd. Sec. 7, Ch. 253, L. 1975; Sec. -205, R.C.M. 1947; amd. and redes. 74-711 by Sec. 11, Ch. 263, L. 1977; R.C.M. 1947, 74-711.

30-11-512. Assistant — who may act and when. (1) An auctioneer, n the event of inability to attend an auction by reason of sickness, the perrmance of a duty imposed upon him by law, or during a temporary absence om the city or county within which he is auctioneer, may employ an agent r employee to hold the auction in his name and behalf.

(2) The employee shall file with the county clerk of the county an affidait swearing to faithfully perform the duties of auctioneer.

(3) An auctioneer may employ a crier at any sale, for whose acts he shall e responsible.

History: En. Sec. 3408, Pol. C. 1895; re-en. Sec. 2127, Rev. C. 1907; re-en. Sec. 4150, R.C.M. 21; Cal. Pol. C. Sec. 3292; re-en. Sec. 4150, R.C.M. 1935; Sec. 66-206, R.C.M. 1947; amd. and des. 74-712 by Sec. 12, Ch. 263, L. 1977; R.C.M. 1947, 74-712.

30-11-513. Auctioneers to designate one place of business — artners. (1) An auctioneer shall designate in writing with the county clerk ne place at which he will conduct auctions within any city.

(2) He shall designate in the same document his partners, if any, in the usiness.

(3) He may not offer goods for sale at a place other than that designated nless the goods are in their original packages, are bulky and usually sold in arehouses, or are usually sold on public streets.

History: En. Sec. 3420, Pol. C. 1895; re-en. Sec. 2128, Rev. C. 1907; re-en. Sec. 4151, R.C.M. 921; Cal. Pol. C. Sec. 3302; re-en. Sec. 4151, R.C.M. 1935; Sec. 66-207, R.C.M. 1947; amd. and des. 74-713 by Sec. 13, Ch. 263, L. 1977; R.C.M. 1947, 74-713.

30-11-514. Penalty. A person convicted of violating a provision of this art shall be fined no more than $500 or imprisoned in the county jail for term not to exceed 6 months, or both. In addition he shall be liable for amages incurred by any aggrieved party by reason of such violation.

History: En. 74-714 by Sec. 14, Ch. 263, L. 1977; R.C.M. 1947, 74-714.

30-11-515. Enforcement. The provisions of this part shall be enforced y the department of business regulation and the county attorney of the ounty in which the violation occurred.

History: En. 74-715 by Sec. 15, Ch. 263, L. 1977; R.C.M. 1947, 74-715.

30-11-516. Powers of cities and towns. Towns and cities may tax, icense, and regulate persons, firms, associations, corporations, or other legal ntities engaging in or desiring to engage in public auctions and may require license and charge a fee therefor. Towns and cities may provide penalties or violations of the requirements.

History: En. Sec. 11, Ch. 111, L. 1955; amd. Sec. 1, Ch. 225, L. 1959; Sec. 66-230, R.C.M. 1947; md. and redes. 74-716 by Sec. 16, Ch. 263, L. 1977; R.C.M. 1947, 74-716.

Part 6

Factors

30-11-601. Factor defined. A factor is an agent who, in the pursuit f an independent calling, is employed by another to sell property for him and is vested by the latter with the possession or control of the property o authorized to receive payment therefor from the purchaser.

History: En. Sec. 2750, Civ. C. 1895; re-en. Sec. 5290, Rev. C. 1907; re-en Sec. 7805, R.C.M. 192 Cal. Civ. C. Sec. 2026; Based on Field Civ. C. Sec. 1045; re-en. 7805, R.C.M. 1935; R.C.M. 194 2-401.

30-11-602. Obedience required from factor. A factor must obe the instructions of his principal to the same extent as any other employe notwithstanding any advances he may have made to his principal upon th property consigned to him, except that if the principal forbids him to sell a the market price, he may, nevertheless, sell for his reimbursement, afte giving to his principal reasonable notice of his intention to do so and of th time and place of sale, and proceeding in all respects as a pledgee.

History: En. Sec. 2751, Civ. C. 1895; re-en. Sec. 5291, Rev. C. 1907; re-en Sec. 7806, R.C.M. 1921 Cal. Civ. C. Sec. 2027; Based on Field Civ. C. Sec. 1046; re-en. 7806, R.C.M. 1935; R.C.M. 194 2-402.

30-11-603. Sales on credit. A factor may sell property consigned t him on such credit as is usual but, having once agreed with the purchase upon the terms of credit, may not extend it.

History: En. Sec. 2752, Civ. C. 1895; re-en. Sec. 5292, Rev. C. 1907; re-en Sec. 7807, R.C.M. 1921 Cal. Civ. C. Sec. 2028; Based on Field Civ. C. Sec. 1047; re-en. 7807, R.C.M. 1935; R.C.M. 1947 2-403.

30-11-604. Liability of factor under guaranty commission. A factor who charges his principal with a guaranty commission upon a sale thereby assumes absolutely to pay the price when it falls due as if it were a debt of his own and not as a mere guarantor for the purchaser. He does not thereby assume any additional responsibility for the safety of his remittance of the proceeds.

History: En. Sec. 2753, Civ. C. 1895; re-en. Sec. 5293, Rev. C. 1907; re-en Sec. 7808, R.C.M. 1921 Cal. Civ. C. Sec. 2029; Based on Field Civ. C. Sec. 1048; re-en. 7808, R.C.M. 1935; R.C.M. 1947 2-404.

30-11-605. Principal's consent needed to relieve factor from liability. A factor who receives property for sale under a general agreement or usage to guarantee the sales or the remittance of the proceeds cannot relieve himself from responsibility therefor without the consent of his principal.

History: En. Sec. 2754, Civ. C. 1895; re-en. Sec. 5294, Rev. C. 1907; re-en Sec. 7809, R.C.M. 1921; Cal. Civ. C. Sec. 2030; Based on Field Civ. C. Sec. 1049; re-en. 7809, R.C.M. 1935; R.C.M. 1947, 2-405.

30-11-606. Authority of factor. In addition to the authority of agents in general, a factor has actual authority for his principal, unless specially restricted, to:

(1) insure property consigned to him uninsured;

(2) sell on credit anything entrusted to him for sale, except such things as it is contrary to usage to sell on credit, but not to pledge, mortgage, or barter the same; and

(3) delegate his authority to his partner or servant but not to any person in an independent employment.

History: En. Sec. 3171, Civ. C. 1895; re-en. Sec. 5464, Rev. C. 1907; re-en Sec. 7979, R.C.M. 1921; Cal. Civ. C. Sec. 2368; Field Civ. C. Sec. 1267; re-en. 7979, R.C.M. 1935; R.C.M. 1947, 2-406.

30-11-607. Ostensible authority. A factor has ostensible authority to eal with the property of his principal as his own in transactions with perons not having notice of the actual ownership.

History: En. Sec. 3172, Civ. C. 1895; re-en. Sec. 5465, Rev. C. 1907; re-en Sec. 7980, R.C.M. 1921; al. Civ. C. Sec. 2369; Field Civ. C. Sec. 1268; re-en. 7980, R.C.M. 1935; R.C.M. 1947, 2-407.

CHAPTER 12

WEIGHTS, MEASURES, STANDARDS, AND LABELING

Part 1 — General Provisions

ection

0-12-101. Definitions.
0-12-102. Systems of weights and measures.
0-12-103. State standards of weight and measure.
0-12-104. Field standards and equipment.
0-12-105. Use of metric sizes in sale of commodities — department to make rules.

Part 2 — Authority of Department of Business Regulation

0-12-201. General powers and duties of department.
0-12-202. Specific powers and duties of department — rules.
0-12-203. Licensing of weighing devices.
0-12-204. Testing at state-supported institutions.
0-12-205. General testing.
0-12-206. Investigations.
0-12-207. Inspection of packages.
0-12-208. Stop-use, stop-removal, and removal orders.
0-12-209. Disposition of correct and incorrect apparatus.
0-12-210. Police powers.
0-12-211. Duty of owners of incorrect apparatus.

Part 3 — Method of Sale of Commodities

0-12-301. Method of sale of commodities — general.
0-12-302. Method of sale of commodities — packages — declarations of quantity and origin — variations — exemptions.
0-12-303. Declarations of unit price on random packages.
0-12-304. Misleading packages.
0-12-305. Advertising packages for sale.
0-12-306. Sale by net weight.
0-12-307. Misrepresentation of price.

Part 4 — Sale of Specific Commodities

0-12-401. Meat, poultry, and seafood.
0-12-402. Bread.
0-12-403. Butter, oleomargarine, and margarine.
0-12-404. Fluid dairy products.
0-12-405. Flour, cornmeal, and hominy grits.
0-12-406. Bulk deliveries sold in terms of weight and delivered by vehicle.
0-12-407. Furnace and stove oil.
0-12-408. Berries and small fruits.
0-12-409. Sale of gasoline and distillates on other than gross volume basis unlawful.

Part 5 — Offenses and Penalties

30-12-501. Construction of contracts.
30-12-502. Hindering or obstructing officer — penalties.
30-12-503. Impersonation of officer — penalties.
30-12-504. Offenses and penalties.
30-12-505. Injunction.
30-12-506. Presumptive evidence.
30-12-507. Validity of prosecutions.

Part 6 — Money of Account

30-12-601. Money of account.
30-12-602. Limitation.

Parts 7 through 9 reserved

Part 10 — Paints—Labeling

30-12-1001. Paints — label — contents of label.
30-12-1002. Enforcement of part.
30-12-1003. Designation of laboratory for analysis.
30-12-1004. County attorney duties.
30-12-1005. Possession as evidence.
30-12-1006. Penalty for violations.

Part 1

General Provisions

30-12-101. Definitions. Unless the context requires otherwise, in parts 1 through 5 of this chapter the following definitions apply:

(1) "Barrel", when used in connection with fermented liquor, means a unit of 31 gallons.

(2) "Commodity in package form" means a commodity put up or packaged in any manner in advance of sale in units suitable for either wholesale or retail sale, exclusive, however, of any auxiliary shipping container enclosing packages that individually conform to the requirements of parts 1 through 5. An individual item or lot of any commodity not in package form as defined in this section, but on which there is marked a selling price based on an established price per unit of weight or of measure, is a commodity in package form.

(3) "Consumer package" or "package of consumer commodity" means a commodity in package form that is customarily produced or distributed for sale through retail sales agencies or instrumentalities for consumption by individuals or use by individuals for the purposes of personal care or in the performance of services ordinarily rendered in or about the household or in connection with personal possessions.

(4) "Cord", when used in connection with wood intended for fuel purposes, means the amount of wood that is contained in a space of 128 cubic feet when the wood is ranked and well stowed.

(5) "Department" means the department of business regulation provided for in Title 2, chapter 15, part 18.

(6) "Intrastate commerce" means any commerce or trade that is begun, arried on, and completed wholly in this state, and the phrase "introduced nto intrastate commerce" defines the time and place at which the first sale nd delivery of a commodity is made in this state, the delivery being made ither directly to the purchaser or to a common carrier for shipment to the urchaser.

(7) "Nonconsumer package" or "package of nonconsumer commodity" neans a commodity in package form other than a consumer package and paricularly a package designed solely for industrial or institutional use or for vholesale distribution only.

(8) "Person" includes individuals, partnerships, corporations, companies, ocieties, and associations.

(9) "Sell" and "sale" include but are not limited to barter and exchange.

(10) "Ton" means a unit of 2,000 pounds avoirdupois weight.

(11) "Weight", when used in connection with any commodity, means net veight.

(12) "Weight", "measure", and "weights and measures" mean all weights nd measures of every kind, instruments and devices for weighing and meauring, and any appliances and accessories associated with those instruments nd devices. The terms do not include meters for the measurement of elecricity, gas (natural or manufactured), or water when they are operated in a ublic utility system. None of the provisions of parts 1 through 5 apply to lectricity, gas, or water meters operated in a public utility system or to any ppliances or accessories associated with them.

History: **En. Sec. 1, Ch. 99, L. 1969; amd. Sec. 146, Ch. 431, L. 1975; R.C.M. 1947, 90-153.**

30-12-102. Systems of weights and measures. The system of veights and measures in customary use in the United States and the metric ystem of weights and measures are jointly recognized, and either one or both f these systems shall be used for all commercial purposes in the state of Montana. The definitions of basic units of weight and measure, the tables of veight and measure, and weights and measures equivalents as published by he national bureau of standards are recognized and shall govern weighing nd measuring equipment and transactions in the state.

History: **En. Sec. 2, Ch. 99, L. 1969; R.C.M. 1947, 90-154.**

30-12-103. State standards of weight and measure. Those veights and measures in conformity with the standards of the United States s have been supplied to the state by the federal government or otherwise btained by this state for use as state standards shall, when they have been ertified as being satisfactory for use as such by the national bureau of standards, be the state standards of weight and measure. The state standards shall be kept in a safe and suitable place in the office or laboratory of the department. They shall not be removed from there except for repairs or for ertification, and they shall be submitted at least once in 10 years to the national bureau of standards for certification.

History: **En. Sec. 4, Ch. 99, L. 1969; amd. Sec. 147, Ch. 431, L. 1975; R.C.M. 1947, 90-156.**

30-12-104. Field standards and equipment. In addition to the state standards provided for in 30-12-103, there shall be supplied by the state such "field standards" and such equipment as may be found necessary to carry out the provisions of parts 1 through 5 of this chapter. The field standards shall be verified upon their initial receipt and at least once each year thereafter by comparison with the state standards.

History: **En. Sec. 5, Ch. 99, L. 1969; R.C.M. 1947, 90-157.**

30-12-105. Use of metric sizes in sale of commodities — department to make rules. Notwithstanding any other provision, metric sizes as defined by the department by rule will be permitted, provided there is compliance with all labeling requirements of the state of Montana.

History: **En. Sec. 1, Ch. 75, L. 1979.**

Compiler's Comments

Statement of intent. The statement of intent attached to Senate Bill 82 (Ch. 75, L. 1979) provided: "A statement of intent is required for this bill in that it delegates authority to adopt rules in Section 1.

Senate Bill 82 is enacted into law in order to provide for the voluntary use of metric sizes in packaging. It is particularly directed at Title 30, chapter 12, part 4, and the following or similar commodities: bread, butter, oleomargarine, and margarine, fluid dairy products, flour, corn meal, and hominy grits, as well as furnace and stove oil, and berries and small fruits. The purpose of providing rulemaking authority for the department in allowing for metric sizes is to provide for voluntary use of metric sizes; that is, the rulemaking process will provide the greatest opportunity for industry and consumer input. If metric sizes were defined by statute as under the current law for other sizes, it is possible that either the industry or the consumer may be forced into a position of accepting sizes which are not compatible with their needs. Furthermore, Congress, while attempting to effect the conversion of the United States to the metric system, may, either by statute or rule, define those packaging requirements for the commodities which this bill deals with. In such an instance, rather than returning to the legislature and requesting amendment to the statute, a more efficient and expeditious method of change is provided for. Thus, bread, fluid dairy products, or the other commodities mentioned may be packaged and sold either in the sizes currently provided for in the statutes or in the sizes which will be defined by department rule with the assistance of the industries and consumers involved."

Incorporation into Existing Law. This section was enacted without any codification instructions and without any definition of "department". The apparent intent of the Legislature was that it become part of Title 30, chapter 12, parts 1 through 5, and that the provisions in parts 1 through 5 apply to it. The Code Commissioner has codified it accordingly. See 1-11-103(4).

Part 2

Authority of Department of Business Regulation

30-12-201. General powers and duties of department. The department shall have the custody of the state standards of weight and measure and of the other standards and equipment provided for by parts 1 through 5 and shall keep accurate records of them. The department shall enforce the provisions of parts 1 through 5. It shall supervise the weights and measures offered for sale, sold, or in use in this state.

History: **En. Sec. 7, Ch. 99, L. 1969; amd. Sec. 148, Ch. 431, L. 1975; R.C.M. 1947, 90-159.**

30-12-202. Specific powers and duties of department — rules. (1) The department shall adopt from time to time reasonable rules for the enforcement of parts 1 through 5, which rules have the effect of law. These rules may include:

(a) schedules of fees for testing and certification;

(b) standards of net weight, measure, or count and reasonable standards of fill for any commodity in package form;

(c) rules governing the technical and reporting procedures to be followed nd the report and record forms and marks of approval and rejection to be sed by the department in the discharge of its official duties;

(d) exemptions from the sealing or marking requirements of 30-12-209 ith respect to weights and measures of a character or size that sealing or arking would be inappropriate, impracticable, or damaging to the apparatus nvolved; and

(e) rules governing the voluntary registration of servicemen and service gencies.

(2) These rules shall include specifications, tolerances, and other technical equirements for weights and measures subject to inspection and testing nder 30-12-205, designed to eliminate from use, without prejudice to appaatus that conforms as closely as practicable to the official standards, those:

(a) that are not accurate;

(b) that are not reasonably permanent in their adjustment or will not epeat their indications correctly; or

(c) that facilitate the perpetration of fraud.

(3) The specifications, tolerances, and other technical requirements for ommercial weighing and measuring devices, together with amendments hereto, as recommended by the national bureau of standards and published n national bureau of standards Handbook 44 and supplements thereto, or in ny publication revising or superseding Handbook 44, are the specifications, olerances, and other technical requirements for commercial weighing and neasuring devices of this state, except insofar as specifically modified, mended, or rejected by a rule issued by the department.

(4) An apparatus shall be considered to be "correct" when it conforms to ll applicable requirements adopted as specified in this section. Other appaatus shall be considered to be "incorrect".

History: En. Sec. 8, Ch. 99, L. 1969; amd. Sec. 149, Ch. 431, L. 1975; R.C.M. 1947, 90-160.

30-12-203. Licensing of weighing devices. (1) No person shall nowingly operate or use any unlicensed weighing devices in trade or comnerce for ascertaining the weight of any commodity.

(2) Such license shall be obtained by making application to the departnent upon blank forms to be provided by the division of weights and meaures. Each license should include at least one inspection per year.

(3) Every application shall be accompanied by the proper fee as estabished by this section.

WEIGHING DEVICES

Capacity	Fees
499 pounds or less	$ 2.50
500 pounds through 1,999 pounds	4.00
2,000 pounds through 7,999 pounds	10.00
8,000 pounds through 40,000 pounds	20.00
40,001 pounds or more	35.00

(4) The capacity of a weighing device shall be determined by the manufacturer's rated capacity.

(5) All licenses shall be annual and shall expire on December 31.

(6) Any person failing to pay the renewal license fee when due as required by this section shall forfeit the right to use the weighing device, and it shall be taken out of service by the division of weights and measures.

History: **En. 90-160.1 by Sec. 1, Ch. 244, L. 1973; R.C.M. 1947, 90-160.1.**

30-12-204. Testing at state-supported institutions. The department shall from time to time test all weights and measures used in checking the receipt or disbursement of supplies in every institution for the maintenance of which moneys are appropriated by the legislature, reporting its findings in writing to the executive officer of the institution concerned.

History: **En. Sec. 9, Ch. 99, L. 1969; amd. Sec. 150, Ch. 431, L. 1975; R.C.M. 1947, 90-161.**

30-12-205. General testing. (1) When not otherwise provided by law, the department may inspect and test to ascertain if they are correct all weights and measures kept, offered, or exposed for sale.

(2) The department, within a 12-month period or less frequently if in accordance with a schedule issued by it, and as often as it considers necessary, shall inspect and test, to ascertain if they are correct, all weights and measures commercially used:

(a) in determining the weight, measurement, or count of commodities or things sold or offered or exposed for sale on the basis of weight, measure, or of count; or

(b) in computing the basic charge or payment for services rendered on the basis of weight, measure, or of count.

(3) With respect to single-service devices designed to be used commercially only once and to be then discarded and with respect to devices uniformly mass-produced, as by means of a mold or die, and not susceptible of individual adjustment, tests may be made on representative samples of the devices. The lots of which the samples are representative shall be held to be correct or incorrect upon the basis of the results of the inspections and tests on the samples.

(4) An itinerant peddler or hawker using weights and measures shall register his name and address with the department, in order that his equipment can be tested in accordance with the provisions of this law.

History: **En. Sec. 10, Ch. 99, L. 1969; amd. Sec. 151, Ch. 431, L. 1975; R.C.M. 1947, 90-162.**

30-12-206. Investigations. The department shall investigate complaints made to it concerning violations of parts 1 through 5. It shall, upon its own initiative, conduct those investigations it considers appropriate and advisable to develop information on prevailing procedures in commercial quantity determination and on possible violations of parts 1 through 5 and to promote the general objective of accuracy in the determination and representation of quantity in commercial transactions.

History: **En. Sec. 11, Ch. 99, L. 1969; amd. Sec. 152, Ch. 431, L. 1975; R.C.M. 1947, 90-163.**

30-12-207. Inspection of packages. (1) The department shall from time to time weigh or measure and inspect packages or amounts of commodities kept, offered, or exposed for sale, sold, or in the process of delivery to determine whether they contain the amounts represented and whether they be kept, offered, or exposed for sale or sold in accordance with law. When hose packages or amounts of commodities are found not to contain the amounts represented or are found to be kept, offered, or exposed for sale in violation of law, the department may order them off sale and may so mark or tag them as to show them to be illegal. In carrying out the provisions of his section, the department may employ recognized sampling procedures under which the compliance of a given lot of packages will be determined on he basis of the result obtained on a sample selected from and representative of that lot.

(2) A person may not:

(a) sell or keep, offer, or expose for sale, in intrastate commerce, any package or amount of commodity that has been ordered off sale or marked or tagged as provided in this section unless the package or amount of commodity has been brought into full compliance with all legal requirements; or

(b) dispose of any package or amount of commodity that has been ordered off sale or marked or tagged as provided in this section and that has not been brought into compliance with legal requirements, in any manner, except with the specific approval of the department.

History: En. Sec. 12, Ch. 99, L. 1969; amd. Sec. 153, Ch. 431, L. 1975; R.C.M. 1947, 90-164.

30-12-208. Stop-use, stop-removal, and removal orders. The department may issue stop-use orders, stop-removal orders, and removal orders with respect to weights and measures being or susceptible of being commercially used and issue stop-removal orders and removal orders with respect to packages or amounts or commodities kept, offered, or exposed for sale, sold, or in process of delivery whenever in the course of enforcement of parts 1 through 5 it considers it necessary or expedient to issue those orders. A person may not use, remove from the premises specified, or fail to remove from the premises specified any weight, measure, or package or amount of commodity contrary to the terms of a stop-use order, stop-removal order, or removal order issued under this section.

History: En. Sec. 13, Ch. 99, L. 1969; amd. Sec. 154, Ch. 431, L. 1975; R.C.M. 1947, 90-165.

30-12-209. Disposition of correct and incorrect apparatus. (1) The department shall approve for use and seal or mark with appropriate devices those weights and measures which it finds upon inspection and test to be "correct" as defined in 30-12-202 and shall reject and mark or tag as "rejected" those weights and measures which it finds, upon inspection or test, to be "incorrect" as defined in 30-12-202 but which in its best judgment are susceptible of satisfactory repair.

(2) The department shall condemn, and may seize and destroy, weights and measures found to be incorrect which, in its best judgment, are not susceptible of satisfactory repair.

(3) Weights and measures that have been rejected may be confiscated and may be destroyed by the department if not corrected as required by 30-12-211 or if used or disposed of contrary to the requirements of 30-12-211.

(4) Sealing or marking are not required with respect to those weights and measures which may be exempted therefrom by a rule of the department issued under 30-12-202.

History: En. Sec. 14, Ch. 99, L. 1969; amd. Sec. 155, Ch. 431, L. 1975; R.C.M. 1947, 90-166.

30-12-210. Police powers. In enforcing the provisions of parts 1 through 5 or any other law pertaining to weights and measures, the department may, in the manner provided by law for peace officers, arrest violators, conduct searches and inspections, and seize for use as evidence incorrect or unsealed weights and measures or packages of commodities unlawfully used, possessed, offered, or exposed for sale or unlawfully sold.

History: En. Sec. 15, Ch. 99, L. 1969; amd. Sec. 156, Ch. 431, L. 1975; R.C.M. 1947, 90-167.

30-12-211. Duty of owners of incorrect apparatus. (1) Weights and measures that have been rejected under the authority of the department shall remain subject to the control of the department until suitable repair or disposition of them has been made as required by this section.

(2) The owner of rejected weights and measures shall correct them within 30 days or a longer period as may be authorized by the department.

(3) In place of this, the owner may dispose of them, but only in a manner specifically authorized by the department.

(4) Weights and measures that have been rejected may not again be used commercially until they have been officially reexamined and found to be correct, or until specific written permission for that use is issued by the department, or until the rejection tag has been removed and the rejected device repaired and placed in service by a person properly registered to perform those acts under a rule issued by the department for the registration of weights and measures servicemen and service agencies.

History: En. Sec. 17, Ch. 99, L. 1969; amd. Sec. 157, Ch. 431, L. 1975; R.C.M. 1947, 90-169.

Part 3

Method of Sale of Commodities

30-12-301. Method of sale of commodities — general. (1) Commodities in liquid form shall be sold only by liquid measure or by weight, and, except as otherwise provided in parts 1 through 5, commodities not in liquid form shall be sold only by weight, by measure of length or area, or by count. Liquid commodities may be sold by weight and commodities not in liquid form may be sold by count only if those methods give accurate information as to the quantity of commodity sold. This section does not apply to:

(a) commodities when sold for immediate consumption on the premises where sold;

(b) vegetables when sold by the head or bunch;

(c) commodities in containers standardized by a law of this state or by federal law;

(d) commodities in package form when there exists a general consumer usage to express the quantity in some other manner;

(e) concrete aggregates, concrete mixtures, and loose solid materials such as earth, soil, gravel, crushed stone, and the like, when sold by cubic measure; or

(f) unprocessed vegetable and animal fertilizer when sold by cubic measure.

(2) The department may adopt reasonable rules necessary to assure that mounts of commodity sold are determined in accordance with good commerial practice and are so determined and represented as to be accurate and nformative to all parties at interest.

History: En. Sec. 18, Ch. 99, L. 1969; amd. Sec. 158, Ch. 431, L. 1975; R.C.M. 1947, 90-170.

30-12-302. Method of sale of commodities — packages — decarations of quantity and origin — variations — exemptions. (1) Except as otherwise provided in parts 1 through 5, a commodity in package orm introduced or delivered for introduction into or received in intrastate ommerce, kept for the purpose of sale, or offered or exposed for sale in ntrastate commerce shall bear on the outside of the package definite, plain, nd conspicuous declarations of:

(a) the identity of the commodity in the package unless it can easily be dentified through the wrapper or container;

(b) the net quantity of the contents in terms of weight, measure, or ount; and

(c) in the case of any package kept, offered, or exposed for sale or sold n any place other than on the premises where packed, the name and place f business of the manufacturer, packer, or distributor, as may be prescribed y rules adopted by the department.

(2) In connection with the declaration required under subsection (1)(b), neither the qualifying term "when packed" nor words of similar import nor ny term qualifying a unit of weight, measure, or count (for example, "jumbo", "giant", "full", and the like) that tends to exaggerate the amount f commodity in a package may be used.

(3) Under subsection (1)(b), the department shall by rule establish:

(a) reasonable variations to be allowed, which may include variations below the declared weight or measure caused by ordinary and customary exposure, only after the commodity is introduced into intrastate commerce, o conditions that normally occur in good distribution practice and that unavoidably result in decreased weight or measure;

(b) exemptions as to small packages; and

(c) exemptions as to commodities put up in variable weights or sizes for sale intact and either customarily not sold as individual units or customarily weighed or measured at time of sale to the consumer.

(4) The marking provisions of this section do not apply to unwrapped oaves of bread or to berries and small fruits sold in conformance with part 4.

History: En. Sec. 19, Ch. 99, L. 1969; amd. Sec. 159, Ch. 431, L. 1975; R.C.M. 1947, 90-171.

30-12-303. Declarations of unit price on random packages. In addition to the declarations required by 30-12-302, any commodity in package form, the package being one of a lot containing random weights, measures, or counts of the same commodity and bearing the total selling price of the package, shall bear on the outside of the package a plain and conspicuous declaration of the price per single unit of weight, measure, or count.

History: En. Sec. 20, Ch. 99, L. 1969; R.C.M. 1947, 90-172.

30-12-304. Misleading packages. A commodity in package form may not be wrapped or in a container made, formed, or filled so as to mislead the purchaser as to the quantity of the contents of the package. The contents of a container may not fall below a reasonable standard of fill which may be prescribed for that commodity by the department.

History: En. Sec. 21, Ch. 99, L. 1969; amd. Sec. 160, Ch. 431, L. 1975; R.C.M. 1947, 90-173.

30-12-305. Advertising packages for sale. Whenever a commodity in package form is advertised in any manner and the retail price of the package is stated in the advertisement, there shall be closely and conspicuously associated with such statement of price a declaration of the basic quantity of contents of the package as required by law or regulation to appear on the package, provided:

(1) that where the law or regulation requires a dual declaration of net quantity to appear on the package, only the declaration that sets forth the quantity in terms of the smaller unit of weight or measure (the declaration that is required to appear first and without parenthesis on the package) need appear in the advertisement; and

(2) that there shall not be included as part of the declaration required under this section such qualifying terms as "when packed", "minimum", "not less than", or any other terms of similar import or any term qualifying a unit of weight, measure, or count (for example, "jumbo", "giant", "full", and the like) that tends to exaggerate the amount of commodity in the package.

History: En. Sec. 22, Ch. 99, L. 1969; R.C.M. 1947, 90-174.

30-12-306. Sale by net weight. When a commodity is sold on the basis of weight, the net weight of the commodity shall be employed and all contracts concerning commodities shall be so construed.

History: En. Sec. 23, Ch. 99, L. 1969; amd. Sec. 161, Ch. 431, L. 1975; R.C.M. 1947, 90-175.

30-12-307. Misrepresentation of price. Whenever any commodity or service is sold or is offered, exposed, or advertised for sale by weight, measure, or count, the price shall not be misrepresented, nor shall the price be represented in any manner calculated or tending to mislead or deceive an actual or prospective purchaser. Whenever an advertised, posted, or labeled price per unit of weight, measure, or count includes a fraction of a cent, all elements of the fraction shall be prominently displayed and the numeral or numerals expressing the fraction shall be immediately adjacent to, of the same general design and style as, and at least one-half the height and width of the numerals representing the whole cents.

History: En. Sec. 24, Ch. 99, L. 1969; R.C.M. 1947, 90-176.

Part 4

Sale of Specific Commodities

30-12-401. Meat, poultry, and seafood. Except for immediate consumption on the premises where sold or as one of several elements comprising a ready-to-eat meal sold as a unit for consumption elsewhere than on the premises where sold, all meat, meat products, poultry (whole or parts), and ll seafood, except shellfish, offered or exposed for sale or sold as food shall be offered or exposed for sale and sold by weight. When meat, poultry, or seafood is combined with or associated with some other food element or elements to form either a distinctive food product or a food combination, such food product or combination shall be offered or exposed for sale and sold by weight and the quantity representation may be the total weight of the product or combination and a quantity representation need not be made for each of the several elements of the product or combination.

History: **En. Sec. 25, Ch. 99, L. 1969; R.C.M. 1947, 90-177.**

30-12-402. Bread. Each loaf of bread and each unit of a twin or multiple loaf of bread produced or procured for sale, kept, offered, exposed for sale, or sold, whether or not the bread is wrapped or sliced, shall weigh ½ pound, 1 pound, 1 ½ pounds, or a multiple of 1 pound, avoirdupois weight, within reasonable variations or tolerances that shall be adopted by rules of the department. This section does not apply to biscuits, buns, or rolls weighing 8 ounces or less or to "stale bread" sold and expressly represented at the time of sale as such.

History: **En. Sec. 26, Ch. 99, L. 1969; amd. Sec. 162, Ch. 431, L. 1975; R.C.M. 1947, 90-178.**

30-12-403. Butter, oleomargarine, and margarine. Butter, oleomargarine, and margarine shall be offered and exposed for sale and sold by weight and only in units of ¼ pound, ½ pound, 1 pound, or multiples of 1 pound, avoirdupois weight.

History: **En. Sec. 27, Ch. 99, L. 1969; R.C.M. 1947, 90-179.**

30-12-404. Fluid dairy products. All fluid dairy products including but not limited to whole milk, skimmed milk, cultured milk, sweet cream, sour cream, and buttermilk shall be packaged for retail sale only in units of less than 1 gill, units of 1 gill, ½ liquid pint, 10 fluid ounces, 1 liquid pint, 1 liquid quart, ½ gallon, 3 liquid quarts, 1 gallon, 1 ½ gallons, 2 gallons, 2 ½ gallons, or multiples of 1 gallon.

History: **En. Sec. 28, Ch. 99, L. 1969; amd. Sec. 1, Ch. 76, L. 1977; R.C.M. 1947, 90-180.**

30-12-405. Flour, cornmeal, and hominy grits. When in package form and when packed, kept, offered, or exposed for sale or sold, wheat flour, whole wheat flour, graham flour, self-rising wheat flour, phosphated wheat flour, bromated flour, enriched flour, enriched self-rising flour, enriched bromated flour, corn flour, cornmeal, and hominy grits shall be packaged only in units of 2, 5, 10, 25, 50, or 100 pounds, avoirdupois weight. Packages in units of less than 2 pounds or more than 100 pounds shall be permitted.

History: **En. Sec. 29, Ch. 99, L. 1969; R.C.M. 1947, 90-181.**

30-12-406. Bulk deliveries sold in terms of weight and delivered by vehicle. (1) When a vehicle delivers to an individual purchaser a commodity in bulk and the commodity is sold in terms of weight units, the delivery shall be accompanied by a duplicate delivery ticket with the following information clearly stated in ink or by means of other indelible marking equipment and in clarity equal to type or printing:

(a) the name and address of the vendor;

(b) the name and address of the purchaser; and
(c) the net weight of the delivery expressed in pounds.

(2) If the net weight is derived from determinations of gross and tare weights, the gross and tare weights also shall be stated in terms of pounds. One of these tickets shall be retained by the vendor, and the other shall be delivered to the purchaser at the time of delivery of the commodity or shall be surrendered on demand to the department. If the department desires to retain it as evidence, it shall issue a weight slip in place of the ticket for delivery to the purchaser. If the purchaser himself carries away his purchase, the vendor shall be required only to give to the purchaser at the time of sale a delivery ticket stating the number of pounds of commodity delivered to him.

History: En. Sec. 30, Ch. 99, L. 1969; amd. Sec. 163, Ch. 431, L. 1975; R.C.M. 1947, 90-182.

30-12-407. Furnace and stove oil. All furnace and stove oil shall be sold by liquid measure or by net weight in accordance with the provisions of 30-12-301. In the case of each delivery of such liquid fuel not in package form and in an amount greater than 10 gallons in the case of sale by liquid measure or 100 pounds in the case of sale by weight, there shall be rendered to the purchaser, either at the time of delivery or within a period mutually agreed upon in writing or otherwise between the vendor and the purchaser, a delivery ticket or a written statement on which, in ink or by means of other indelible marking equipment and in clarity equal to type or printing, there shall be clearly stated:

(1) the name and address of the vendor;
(2) the name and address of the purchaser;
(3) the identity of the type of fuel comprising the delivery;
(4) the unit price (that is, the price per gallon or per pound, as the case may be) of the fuel delivered;
(5) in the case of sale by liquid measure, the liquid volume of the delivery, together with any meter readings from which such liquid volume has been computed, expressed in terms of the gallon and its binary or decimal subdivisions; and
(6) in the case of sale by weight, the net weight of the delivery, together with any weighing scale readings from which such net weight has been computed, expressed in terms of tons or pounds avoirdupois.

History: En. Sec. 31, Ch. 99, L. 1969; R.C.M. 1947, 90-183.

30-12-408. Berries and small fruits. Berries and small fruits shall be offered and exposed for sale and sold by weight, or by measure in open containers having capacities of ½ dry pint, 1 dry pint, or 1 dry quart.

History: En. Sec. 32, Ch. 99, L. 1969; amd. Sec. 164, Ch. 431, L. 1975; R.C.M. 1947, 90-184.

30-12-409. Sale of gasoline and distillates on other than gross volume basis unlawful. The sale of gasoline and distillates on a temperature corrected basis or on any basis other than the gross volume of gasoline or distillate actually delivered is void. Any contract in violation of this section shall be unenforceable to the extent of the violation.

History: En. 13-812 by Sec. 1, Ch. 198, L. 1975; amd. Sec. 1, Ch. 274, L. 1977; R.C.M. 1947, 13-812.

Part 5

Offenses and Penalties

30-12-501. Construction of contracts. Fractional parts of any unit f weight or measure shall mean like fractional parts of the value of such nit as prescribed or defined in 30-12-101 and 30-12-102, and all contracts oncerning the sale of commodities and services shall be construed in accor- ance with this requirement.

History: En. Sec. 33, Ch. 99, L. 1969; R.C.M. 1947, 90-185.

30-12-502. Hindering or obstructing officer — penalties. A erson who hinders or obstructs the department in any way in the perfor- nance of its official duties is guilty of a misdemeanor and upon conviction hall be fined not less than $20 or more than $200 or imprisoned not more han 3 months or both fined and imprisoned.

History: En. Sec. 34, Ch. 99, L. 1969; amd. Sec. 165, Ch. 431, L. 1975; R.C.M. 1947, 90-186.

30-12-503. Impersonation of officer — penalties. A person who in ny way impersonates a person charged with enforcement of parts 1 through by the department, by the use of its seal or a counterfeit of its seal or in ny other manner, is guilty of a misdemeanor and upon conviction shall be ined not less than $100 or more than $500 or imprisoned for not more than year or both fined and imprisoned.

History: En. Sec. 35, Ch. 99, L. 1969; amd. Sec. 166, Ch. 431, L. 1975; R.C.M. 1947, 90-187.

30-12-504. Offenses and penalties. (1) A person may not:

(a) use or possess for the purpose of using for a commercial purpose pecified in 30-12-205, sell, offer or expose for sale or hire, or possess for the urpose of selling or hiring an incorrect weight or measure or any device or nstrument used to or calculated to falsify any weight or measure;

(b) use or possess for the purpose of current use for a commercial pur- ose specified in 30-12-205 a weight or measure that does not bear a seal or nark specified in 30-12-209, unless that weight or measure has been xempted from testing by 30-12-205 or by a rule of the department issued nder 30-12-202 or unless the device has been placed in service as provided y a rule of the department issued under 30-12-202. A person using weighing r measuring devices subject to parts 1 through 5 must report to the depart- nent, in writing, the number and location of the weighing or measuring evice and must promptly report the installation of any new weighing or neasuring device.

(c) dispose of a rejected or condemned weight or measure in a manner ontrary to law or rule;

(d) remove from a weight or measure, contrary to law or rule, any tag, eal, or mark placed on it by the appropriate authority;

(e) sell or offer or expose for sale less than the quantity he represents of commodity, thing, or service;

(f) take more than the quantity he represents of a commodity, thing, or ervice when, as buyer, he furnishes the weight or measure by means of which the amount of the commodity, thing, or service is determined;

(g) keep for the purpose of sale, advertise or offer or expose for sale, o sell a commodity, thing, or service in a condition or manner contrary to lav or rule;

(h) use in retail trade, except in the preparation of packages put up ir advance of sale and of medical prescriptions, a weight or measure that is no so positioned that its indications may be accurately read and the weighing or measuring operation observed from some position which may reasonabl be assumed by a customer;

(i) violate a provision of parts 1 through 5 or of the rules adopted unde parts 1 through 5 for which a specific penalty is not prescribed.

(2) A person who violates, or who knowingly allows an employee or agen to violate, this section is guilty of a misdemeanor and upon a first convictio shall be fined not less than $20 or more than $200 or imprisoned for no more than 3 months or both fined and imprisoned. Upon a second or subsequent conviction, he shall be fined not less than $50 or more than $500 o imprisoned for not more than 1 year or both fined and imprisoned.

History: **En. Sec. 36, Ch. 99, L. 1969; amd. Sec. 167, Ch. 431, L. 1975; R.C.M. 1947, 90-188.**

30-12-505. Injunction. The department may apply to any court o competent jurisdiction for, and that court upon hearing and for cause shown may grant, a temporary or permanent injunction restraining a person from violating any provision of parts 1 through 5 of this chapter.

History: **En. Sec. 37, Ch. 99, L. 1969; amd. Sec. 168, Ch. 431, L. 1975; R.C.M. 1947, 90-189.**

30-12-506. Presumptive evidence. For the purposes of parts 1 through 5, proof of the existence of a weight or measure or a weighing or measuring device in or about any building, enclosure, stand, or vehicle in which or from which is shown that buying or selling is commonly carried on is, in the absence of credible evidence to the contrary, presumptive proof of the regular use of that weight or measure or weighing or measuring device for commercial purposes and of the use by the person in charge of the building, enclosure, stand, or vehicle.

History: **En. Sec. 38, Ch. 99, L. 1969; amd. Sec. 169, Ch. 431, L. 1975; R.C.M. 1947, 90-190.**

30-12-507. Validity of prosecutions. Prosecutions for violation of any provision of parts 1 through 5 are declared to be valid and proper, notwithstanding the existence of any other valid general or specific law of this state dealing with matters that may be the same as or similar to those covered by parts 1 through 5.

History: **En. Sec. 39, Ch. 99, L. 1969; R.C.M. 1947, 90-191.**

Part 6

Money of Account

30-12-601. Money of account. The money of account in this state is the dollar, cent, and mill. Public accounts and all proceedings in courts must be kept and had in conformity to this regulation.

History: **En. Sec. 3150, Pol. C. 1895; re-en. Sec. 2033, Rev. C. 1907; re-en. Sec. 4283, R.C.M. 1921; Cal. Pol. C. Sec. 3272; re-en. Sec. 4283, R.C.M. 1935; R.C.M. 1947, 90-501.**

30-12-602. Limitation. The provisions of 30-12-601 do not vitiate or ffect any account, charge, or entry originally made or any note, bond, or ther instrument expressed in any other money of account; but the same ust be reduced to dollars and cents in any action.

History: En. Sec. 3151, Pol. C. 1895; re-en. Sec. 2034, Rev. C. 1907; re-en. Sec. 4284, R.C.M. 21; Cal. Pol. C. Sec. 3273; re-en. Sec. 4284, R.C.M. 1935; R.C.M. 1947, 90-502.

Parts 7 through 9 reserved

Part 10

Paints — Labeling

30-12-1001. Paints — label — contents of label. A person, firm, or orporation who manufactures for sale, sells, offers for sale, or ships in intrastate transactions within the state any paint, mixed paint, paste paint, or ompound intended for use as paint, or any varnish, decorative protective oating, or additive for wood, metal, concrete, or roof coating, but excluding rtists' colors, waxes, and polishes, shall label it in a clear and distinct maner. The label shall recite a full analysis of the content with a specification f pigment and vehicle, including the analysis by percentage of the pigment ontent and the analysis by percentage of the vehicle content. The label shall urther recite the name and address of the manufacturer or distributor of the roduct. The analysis and composition may be inspected by the chief chemist f a laboratory designated by the department of business regulation.

History: En. Sec. 1, Ch. 69, L. 1959; Sec. 3-1510, R.C.M. 1947; amd. and redes. 90-701 by Sec. 0, Ch. 218, L. 1974; R.C.M. 1947, 90-701.

30-12-1002. Enforcement of part. The department of business reguation shall enforce this part. The department shall have access to all places f business, factories, stores, and buildings used for the manufacture or sale f paints or other products described in 30-12-1001. The department may urchase and open any package, can, jar, tube, or other receptacle containing ny of the articles described in 30-12-1001 and found during an inspection.

History: En. Sec. 4, Ch. 69, L. 1959; Sec. 3-1513, R.C.M. 1947; amd. and redes. 90-702 by Sec. 3, Ch. 218, L. 1974; R.C.M. 1947, 90-702; amd. Sec. 6, Ch. 137, L. 1979.

30-12-1003. Designation of laboratory for analysis. The department of business regulation shall designate the laboratory where analysis of the products described in 30-12-1001 shall be made. When products are found to be in violation of this part, the chief chemist of the laboratory designated by the department shall report the facts to the department. A certificate signed by the chief chemist of the laboratory relating to the analysis of any of the products mentioned in 30-12-1001 is presumptive evidence of the facts stated in it.

History: En. Sec. 5, Ch. 69, L. 1959; Sec. 3-1514, R.C.M. 1947; amd. and redes. 90-703 by Sec. 84, Ch. 218, L. 1974; R.C.M. 1947, 90-703.

30-12-1004. County attorney duties. The county attorney of the county where the violation of this part occurred shall prosecute every person, firm, or corporation violating this part when the evidence of the violation has been presented by the chief chemist of the laboratory making the analysis.

History: En. Sec. 6, Ch. 69, L. 1959; Sec. 3-1515, R.C.M. 1947; amd. and redes. 90-704 by Sec. 85, Ch. 218, L. 1974; R.C.M. 1947, 90-704.

30-12-1005. Possession as evidence. The possession, either constructive or actual, by a person, firm, or corporation dealing in the articles or substances described in 30-12-1001 and not properly labeled as provided by 30-12-1001 is prima facie evidence that those articles or substances are kept for sale in violation of this part.

History: En. Sec. 3, Ch. 69, L. 1959; Sec. 3-1512, R.C.M. 1947; amd. and redes. 90-705 by Sec. 82, Ch. 218, L. 1974; R.C.M. 1947, 90-705.

30-12-1006. Penalty for violations. A person, firm, or corporation who violates this part shall be prosecuted and fined not less than $25 or more than $100 and all costs, including cost of analysis to the amount of $25, or shall be imprisoned in the county jail for not more than 60 days.

History: En. Sec. 2, Ch. 69, L. 1959; Sec. 3-1511, R.C.M. 1947; amd. and redes. 90-706 by Sec. 81, Ch. 218, L. 1974; R.C.M. 1947, 90-706.

CHAPTER 13

ASSUMED BUSINESS NAMES, TRADEMARKS, AND RELATED RIGHTS

Part 1 — General Provisions

Section
30-13-101. Trademark defined.
30-13-102. Trademarks and signs.
30-13-103. Recording of trademark.
30-13-104. Record of trademarks or names — fee.
30-13-105. Ownership and transfer of trademarks.
30-13-106. Trademarks for beverage container marks.
30-13-107. Penalties.
Sections 30-13-108 through 30-13-110 reserved.
30-13-111. Repealed. Sec. 18, Ch. 260, L. 1979.
30-13-112. Registration of ranch owners.
Sections 30-13-113 through 30-13-120 reserved.
30-13-121. Goodwill of business.
30-13-122. Goodwill transferable.
Sections 30-13-123 through 30-13-130 reserved.
30-13-131. Product of the mind — ownership.
30-13-132. Joint authorship.
30-13-133. Transfer.
30-13-134. Effect of publication.
30-13-135. Subsequent inventor or author.
30-13-136. Private writings.
Sections 30-13-137 through 30-13-140 reserved.
30-13-141. Definitions.
30-13-142. Unauthorized manufacture of sound recordings prohibited.
30-13-143. Sale of unauthorized sound recordings prohibited.
30-13-144. Sale of sound recording without name of manufacturer and name of performer or group prohibited.
30-13-145. Forfeiture.
30-13-146. Exceptions.
30-13-147. Civil litigation.

Part 2 — Assumed Business Names

-13-201. Definitions.
-13-202. Registration of assumed business name similar to reserved or registered name or mark prohibited.
-13-203. Application for registration of assumed business name.
-13-204. Filing application for registration — issuance of certificate.
-13-205. When registration of assumed business name by foreign corporation prohibited.
-13-206. Term and renewal of assumed business name registration.
-13-207. Application for renewal of assumed business name.
-13-208. Filing of application for renewal of registration of assumed business name — issuance of certificate thereon.
-13-209. Amendment.
-13-210. Filing amendment to registration of assumed business name — issuance of certificate thereon.
-13-211. Reservation of proposed assumed business name.
-13-212. Filing application for reservation of assumed business name — issuance of certificate thereon.
-13-213. Voluntary cancellation of registration of assumed business name.
-13-214. Cancellation of registration of assumed business name upon dissolution of domestic corporation — withdrawal or revocation of foreign corporation's authority to transact business.
-13-215. Effect of failing to file application for registration of assumed business name.
-13-216. Evidentiary effect of certificates and documents of secretary of state.
-13-217. Fees for filing documents and issuing certificates.

Part 3 — Trademarks

-13-301. Definitions.
-13-302. When mark considered used in this state.
-13-303. Registrability.
Sections 30-13-304 through 30-13-310 reserved.
-13-311. Application for registration.
-13-312. Filing application and issuing certificate of registration.
-13-313. Duration and renewal.
-13-314. Filing application for renewal of registration — issuing certificate of renewal.
-13-315. Assignment.
-13-316. Filing of assignment — issuing certificate of assignment.
-13-317. Records.
-13-318. Cancellation.
Sections 30-13-319 through 30-13-330 reserved.
-13-331. Classification.
-13-332. Fraudulent registration.
-13-333. Infringement.
-13-334. Injury to business reputation — dilution.
-13-335. Remedies.
-13-336. Common-law rights.

Part 1

General Provisions

30-13-101. *(Temporary)* **Trademark defined.** The phrase "trade-
ark", as used in this chapter, includes every description of word, letter,
evice, emblem, stamp, imprint, brand, printed ticket, label, or wrapper usu-
ly affixed by any mechanic, manufacturer, druggist, merchant, or trades-
an, to denote any goods to be goods imported, manufactured, produced,

compounded, or sold by him, other than any name, word, or expressio generally denoting any goods to be of some particular class or description, o the designation or name for any mill, hotel, factory, or other business **(Repealed effective July 1, 1980; Sec. 22, Ch. 429, L. 1979)**

History: En. Sec. 3160, Pol. C. 1895; re-en. Sec. 2036, Rev. C. 1907; re-en. Sec. 4286, R.C.M 1921; Cal. Pol. C. Sec. 3196; re-en. Sec. 4286, R.C.M. 1935; R.C.M. 1947, 85-101.

30-13-102. *(Temporary)* **Trademarks and signs.** One who produce or deals in a particular thing or conducts a particular business may appropriate to his exclusive use as a trademark any form, symbol, or name which ha not been so appropriated by another to designate the origin or ownershi thereof. But he cannot exclusively appropriate any designation or part of designation which relates only to the name, quality, or description of th thing or business or the place where the thing is produced or the busines is carried on. **(Repealed effective July 1, 1980; Sec. 22, Ch. 429, L 1979)**

History: En. Sec. 1370, Civ. C. 1895; re-en. Sec. 4565, Rev. C. 1907; re-en. Sec. 6812, R.C.M 1921; Cal. Civ. C. Sec. 991; Based on Field Civ. C. Sec. 435; re-en. Sec. 6812, R.C.M. 1935; R.C.M 1947, 67-1110.

30-13-103. *(Temporary)* **Recording of trademark.** Any person ma record any trademark or name by filing with the secretary of state his clair to the same and a copy or description of such trademark or name, with hi affidavit attached thereto, certified to by any officer authorized to tak acknowledgments of conveyances, setting forth that he or the firm or corporation of which he is a member is the exclusive owner, or agent of the owner of such trademark or name. **(Repealed effective July 1, 1980; Sec. 22 Ch. 429, L. 1979)**

History: En. Sec. 1, p. 103, L. 1899; re-en. Sec. 2037, Rev. C. 1907; re-en. Sec. 4287, R.C.M. 1921 Cal. Pol. C. Sec. 3197; re-en. Sec. 4287, R.C.M. 1935; R.C.M. 1947, 85-102.

30-13-104. *(Temporary)* **Record of trademarks or names — fee** The secretary of state must keep for public examination a record of al trademarks or names filed in his office, with the date when filed and the name of the claimant, and must not record any two like trademarks o names; provided, however, that in the event that an affidavit, attested by tw witnesses, is filed in the office of the secretary of state to the effect that any trademark or name recorded therein in the name of any person or persons corporation, or association has not been used by such person or persons, corporation, or association, their successors or assigns, for a period of 5 years immediately preceding the filing of said affidavit, then and in that event the secretary of state is authorized, empowered, and directed to record said trademark or name in the name of the person making application therefor in said affidavit or in the name of the person or persons, corporation, or association for whose benefit said application and affidavit are made, but without prejudice to any person claiming to be injured thereby to contest the same in any court of competent jurisdiction within a period of 6 months thereafter. He must, at the time of filing and recording a trademark or name, collect from the claimant the fee set forth in 2-6-103. **(Repealed effective July 1, 1980; Sec. 22, Ch. 429, L. 1979)**

History: En. Sec. 1, p. 103, L. 1899; re-en. Sec. 2038, Rev. C. 1907; re-en. Sec. 4288, R.C.M. 1921; Cal. Pol. C. Sec. 3198; amd. Sec. 1, Ch. 68, L. 1931; re-en. Sec. 4288, R.C.M. 1935; amd. Sec. 16, Ch. 117, L. 1961; R.C.M. 1947, 85-103.

30-13-105. *(Temporary)* **Ownership and transfer of trademarks.** ny person who has first adopted and used a trademark or name, whether within or beyond the limits of this state, is its original owner. Such ownership may be transferred in the same manner as personal property and is entitled to the same protection by suits at law. Any court of competent urisdiction may restrain by injunction any use of trademarks or names in iolation of this chapter. **(Repealed effective July 1, 1980; Sec. 22, Ch. 29, L. 1979)**

History: En. Sec. 3163, Pol. C. 1895; re-en. Sec. 2039, Rev. C. 1907; re-en. Sec. 4289, R.C.M. 921; Cal. Pol. C. Sec. 3199; re-en. Sec. 4289, R.C.M. 1935; R.C.M. 1947, 85-104.

30-13-106. *(Temporary)* **Trademarks for beverage container marks.** Any person engaged in manufacturing, bottling, or selling soda, mineral, or aerated waters, cider, ginger ale, or other aerated, nonintoxicating beverages in bottles or siphons with his name or other marks or devices branded, stamped, engraved, etched, blown, impressed, or otherwise produced upon such bottles or siphons or the boxes used by him may have a trademark or the same as provided in this chapter. **(Repealed effective July 1, 1980; Sec. 22, Ch. 429, L. 1979)**

History: En. Sec. 3300, Pol. C. 1895; re-en. Sec. 2103, Rev. C. 1907; re-en. Sec. 4291, R.C.M. 921; re-en. Sec. 4291, R.C.M. 1935; R.C.M. 1947, 85-106.

30-13-107. *(Temporary)* **Penalties.** (1) The penalty for forging, counterfeiting, or unlawful using of trademarks is as provided in 45-6-318 or 45-6-325, whichever is applicable.

(2) Every person who violates the provisions of 30-13-106 is punishable as provided in 45-6-318 and 45-6-325. **(Repealed effective July 1, 1980; Sec. 22, Ch. 429, L. 1979)**

History: (1)En. Sec. 3164, Pol. C. 1895; re-en. Sec. 2040, Rev. C. 1907; re-en. Sec. 4290, R.C.M. 921; re-en. Sec. 4290, R.C.M. 1935; amd. Sec. 22, Ch. 513, L. 1973; amd. Sec. 6, Ch. 265, L. 1977; Sec. 85-105, R.C.M. 1947; (2)En. Sec. 3301, Pol. C. 1895; re-en. Sec. 2104, Rev. C. 1907; re-en. Sec. 4292, R.C.M. 1921; re-en. Sec. 4292, R.C.M. 1935; amd. Sec. 7, Ch. 265, L. 1977; Sec. 85-107, R.C.M. 1947; R.C.M. 1947, 85-105, 85-107.

30-13-108 through 30-13-110 reserved.

30-13-111. Repealed. Sec. 18, Ch. 260, L. 1979.

30-13-112. Registration of ranch owners. The owner of any farm or ranch in the state of Montana may, upon the payment of $1 to the county clerk and recorder in the county in which the farm or ranch may be situated, have the name of such farm or ranch entered and recorded in a register, which the county clerk and recorder shall keep for such purpose, and thereupon such owner shall be furnished a certificate by said clerk and recorder issued under the seal of said official, setting forth therein the name and location of the farm or ranch, and the name of such owner. When any name shall have been recorded as hereinbefore provided, any other person or persons shall not have the right to use the same name for any other farm or ranch in the same county, except by prefixing or adding thereto designating or other identifying words.

History: En. Sec. 1, Ch. 49, L. 1913; re-en. Sec. 6897, R.C.M. 1921; re-en. Sec. 6897, R.C.M. 1935; R.C.M. 1947, 73-109.

30-13-113 through 30-13-120 reserved.

30-13-121. Goodwill of business. The goodwill of a business is th expectation of continued public patronage, but it does not include a right t use the name of any person from whom it was acquired.

History: En. Sec. 1371, Civ. C. 1895; re-en. Sec. 4566, Rev. C. 1907; re-en. Sec. 6813, R.C.M 1921; Cal. Civ. C. Sec. 992; Field Civ. C. Sec. 436; re-en. Sec. 6813, R.C.M. 1935; R.C.M. 1947 67-1111.

30-13-122. Goodwill transferable. The goodwill of a business i property, transferable like any other.

History: En. Sec. 1372, Civ. C. 1895; re-en. Sec. 4567, Rev. C. 1907; re-en. Sec. 6814, R.C.M 1921; Cal. Civ. C. Sec. 993; Field Civ. C. Sec. 437; re-en. Sec. 6814, R.C.M. 1935; R.C.M. 1947 67-1112.

30-13-123 through 30-13-130 reserved.

30-13-131. Product of the mind — ownership. The author of an product of the mind, whether it is an invention, a composition in letters o art, or a design, with or without delineation or other graphical representation has an exclusive ownership therein and in the representation or expressio thereof which continues so long as the product and the representations o expressions thereof made by him remain in his possession.

History: En. Sec. 1360, Civ. C. 1895; re-en. Sec. 4559, Rev. C. 1907; re-en. Sec. 6806, R.C.M 1921; Cal. Civ. C. Sec. 980; Field Civ. C. Sec. 429; re-en. Sec. 6806, R.C.M. 1935; R.C.M. 1947 67-1104.

30-13-132. Joint authorship. Unless otherwise agreed, a product o the mind in the production of which several persons are jointly concerned i owned by them as follows:

(1) if the product is single, in equal proportions;

(2) if it is not single, in proportion to the contribution of each.

History: En. Sec. 1361, Civ. C. 1895; re-en. Sec. 4560, Rev. C. 1907; re-en. Sec. 6807, R.C.M 1921; Cal. Civ. C. Sec. 981; Field Civ. C. Sec. 430; re-en. Sec. 6807, R.C.M. 1935; R.C.M. 1947 67-1105.

30-13-133. Transfer. The owner of any product of the mind or of any representation or expression thereof may transfer his interest in the same.

History: En. Sec. 1362, Civ. C. 1895; re-en. Sec. 4561, Rev. C. 1907; re-en. Sec. 6808, R.C.M 1921; Cal. Civ. C. Sec. 982; Field Civ. C. Sec. 431; re-en. Sec. 6808, R.C.M. 1935; R.C.M. 1947 67-1106; amd. Sec. 7, Ch. 137, L. 1979.

30-13-134. Effect of publication. If the owner of a product of the mind intentionally makes it public, a copy or reproduction may be made public by any person without responsibility to the owner, so far as the law of this state is concerned.

History: En. Sec. 1363, Civ. C. 1895; re-en. Sec. 4562, Rev. C. 1907; re-en. Sec. 6809, R.C.M. 1921; Cal. Civ. C. Sec. 983; Field Civ. C. Sec. 432; re-en. Sec. 6809, R.C.M. 1935; R.C.M. 1947, 67-1107.

30-13-135. Subsequent inventor or author. If the owner of a product of the mind does not make it public, any other person subsequently and originally producing the same thing has the same right therein as the prior author, which is exclusive to the same extent against all persons except the prior author or those claiming under him.

History: En. Sec. 1364, Civ. C. 1895; re-en. Sec. 4563, Rev. C. 1907; re-en. Sec. 6810, R.C.M. 1921; Cal. Civ. C. Sec. 984; Field Civ. C. Sec. 433; re-en. Sec. 6810, R.C.M. 1935; R.C.M. 1947, 67-1108.

30-13-136. Private writings. Letters and other private communications in writing belong to the person to whom they are addressed and delivered, but they cannot be published against the will of the writer except by authority of law.

History: En. Sec. 1365, Civ. C. 1895; re-en. Sec. 4564, Rev. C. 1907; re-en. Sec. 6811, R.C.M. 1921; Cal. Civ. C. Sec. 985; Field Civ. C. Sec. 434; re-en. Sec. 6811, R.C.M. 1935; R.C.M. 1947, 67-1109.

30-13-137 through 30-13-140 reserved.

30-13-141. Definitions. As used in 30-13-141 through 30-13-147, the following definitions apply:

(1) "Person" means any individual, firm, partnership, corporation, or association.

(2) "Owner" means the person who owns the original fixation of sounds embodied in a master phonograph record, master disc, master tape, master film, or other device used for reproducing sounds on phonograph records, discs, tapes, films, or other articles upon which sound is recorded and from which the transferred recorded sounds are directly derived.

(3) "Performer" means the person or persons appearing in a performance.

(4) "Sound recording" means a phonograph record, disc, wire, tape, film, or other article on which sound is recorded.

History: En. Sec. 1, Ch. 367, L. 1977; R.C.M. 1947, 85-601.

30-13-142. Unauthorized manufacture of sound recordings prohibited. (1) No person may knowingly, without the consent of the owner, transfer or cause to be transferred any sounds recorded on a sound recording with the intent to sell or cause to be sold for profit any sound recordings onto which such sounds are transferred or to use such sound recordings to promote the sale of any product.

(2) No person may knowingly and without the consent of the performer transfer or cause to be transferred to any sound recording any performance, whether live before an audience or transmitted by wire or through the air by radio or television, with the intent to sell or cause to be sold for profit or to be used to promote the sale of any product such sound recording onto which such performance is so transferred.

(3) A person convicted of violating this section shall be imprisoned in the state prison for any term not to exceed 10 years.

History: En. Sec. 2, Ch. 367, L. 1977; R.C.M. 1947, 85-602.

30-13-143. Sale of unauthorized sound recordings prohibited. (1) No person may knowingly, or with reasonable grounds to know, advertise, offer for sale or resale, sell or resell, or distribute or possess for such purposes any sound recording that has been produced without the consent of the owner. Possession of 5 or more duplicate copies or 20 or more individual copies of such sound recording produced without the consent of the owner creates a rebuttable presumption that the copies are intended for sale or distribution in violation of this section.

(2) No person may knowingly, or with reasonable grounds to know, advertise, offer for sale or resale, sell or resell, or distribute or possess for such purposes any sound recordings embodying any performance, whether live before an audience or transmitted by wire or through the air by radio or television, without the prior express written consent of the performer.

(3) A person convicted of violating this section shall be fined no more than $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: **En. Sec. 3, Ch. 367, L. 1977; R.C.M. 1947, 85-603.**

30-13-144. Sale of sound recording without name of manufacturer and name of performer or group prohibited. (1) No person may advertise, offer for sale or resale, sell or resell, or distribute or possess for such purposes any sound recording unless the outside cover, box, or jacket clearly and conspicuously discloses the name and address of its manufacturer and the name of the performer actually producing the sounds recorded.

(2) A person convicted of violating this section shall be fined no more than $500 or be imprisoned in the county jail for any term not to exceed 6 months, or both.

History: **En. Sec. 4, Ch. 367, L. 1977; R.C.M. 1947, 85-604.**

30-13-145. Forfeiture. Any article produced in violation of 30-13-142 through 30-13-144 and any equipment used to produce it are subject to forfeiture to and destruction by the appropriate law enforcement agency.

History: **En. Sec. 5, Ch. 367, L. 1977; R.C.M. 1947, 85-605.**

30-13-146. Exceptions. Sections 30-13-141 through 30-13-147 do not apply to:

(1) any broadcaster who, in connection with a radio, television, or cable broadcast transmission or for the purpose of archival preservation, transfers any sounds recorded on a sound recording;

(2) any person who transfers such sounds in the home for personal use, without compensation; or

(3) any person who transfers a single copy of such sounds for bona fide educational purposes, provided that no person directly or indirectly derives any pecuniary gain from such transfer.

History: **En. Sec. 6, Ch. 367, L. 1977; R.C.M. 1947, 85-606.**

30-13-147. Civil litigation. Sections 30-13-141 through 30-13-147 neither enlarge nor diminish the rights of parties in civil litigation.

History: **En. Sec. 7, Ch. 367, L. 1977; R.C.M. 1947, 85-607.**

Part 2

Assumed Business Names

30-13-201. Definitions. As used in this part, the following definitions apply:

(1) "Assumed business name" means any business name other than the full, true, and correct name of a person.

(2) "Person" means any individual, partnership, corporation, or other association.

History: En Sec. 1, Ch. 260, L. 1979.

30-13-202. Registration of assumed business name similar to reserved or registered name or mark prohibited. When an application for registration or amendment to the registration of an assumed business name contains an assumed business name which is the same as or deceptively similar to an assumed business name already registered or to any corporate name, limited partnership, trademark, or service mark registered with the secretary of state, the secretary of state may not register the assumed business name for which application is made.

History: En Sec. 2, Ch. 260, L. 1979.

30-13-203. Application for registration of assumed business name. All persons transacting business in this state under an assumed business name shall execute, verify, and file with the secretary of state, on forms furnished by the secretary of state, an application for registration of the assumed business name, including but not limited to the following information:

(1) the name and address, including the street name and number, of applicant;

(2) the complete name of proposed assumed business name;

(3) date of first use, in commerce, of assumed business name;

(4) description of business transacted under such name; and

(5) the name of county or counties in which business is being transacted.

History: En Sec. 3, Ch. 260, L. 1979.

30-13-204. Filing application for registration — issuance of certificate. (1) Duplicate originals of application for registration of assumed business name shall be delivered to the secretary of state. If the secretary of state finds the application complies with the provisions of this part, he shall, when all fees have been paid as provided in this part:

(a) endorse on each of the duplicate originals the word "filed" and the month, day, and year of the filing thereof;

(b) file one of the duplicate originals in his office; and

(c) issue a certificate of registration, to which he shall affix the other original.

(2) The certificate of registration, together with the duplicate original of the application for registration of an assumed business name affixed thereto by the secretary of state, shall be returned to the applicant.

(3) The registration of an assumed business name remains in effect until canceled.

History: En Sec. 4, Ch. 260, L. 1979.

30-13-205. When registration of assumed business name by foreign corporation prohibited. No foreign corporation which does not have an effective certificate of authority to transact business in this state may register an assumed business name as provided for in this part.

History: **En Sec. 5, Ch. 260, L. 1979.**

30-13-206. Term and renewal of assumed business name registration. (1) Registration of an assumed business name is effective for a term of 5 years from the date of registration. Upon application for renewal of registration on forms furnished by the secretary of state, the registration may be renewed for another 5-year term.

(2) Not less than 90 days before the expiration date of registration of an assumed business name, the secretary of state shall notify the applicant of record of the pending expiration by addressing a notice to the last-known address of such applicant.

(3) If the applicant or person in whose name an assumed business name is registered fails to file an application for renewal with the secretary of state within a 90-day period prior to the expiration date of such registration, the secretary of state shall cancel the registration.

History: **En Sec. 6, Ch. 260, L. 1979.**

30-13-207. Application for renewal of assumed business name. Duplicate originals of application for renewal of registration of an assumed business name shall be executed, verified, and delivered to the secretary of state. The application shall include but not be limited to the following information:

(1) the complete assumed business name;

(2) the name and address, including street name and number, if any, of applicant;

(3) description of business transacted; and

(4) the name of the county or counties in which business is being transacted.

History: **En Sec. 7, Ch. 260, L. 1979.**

30-13-208. Filing of application for renewal of registration of assumed business name — issuance of certificate thereon. (1) If the secretary of state finds the application complies with the provisions of this part, he shall, when all fees have been paid as provided in this part:

(a) endorse on each of the duplicate originals the word "filed" and the month, day, and year of the filing thereof;

(b) file one of the duplicate originals in his office; and

(c) issue a certificate of renewal, to which he shall affix the other duplicate original.

(2) The certificate of renewal, together with the duplicate original of application for renewal of registration of an assumed business name affixed thereto by the secretary of state, shall be returned to the applicant.

History: **En Sec. 8, Ch. 260, L. 1979.**

30-13-209. Amendment. An amendment to registration of an assumed business name shall be filed with the secretary of state within 60 days after any one of the following events occurs:

(1) there is a change in the name or identity of the person or persons transacting or having interest in the business for which the name is registered;

(2) there is a change in the identity of the county or counties in which the name is or is intended to be used;

(3) a person having an interest in the business with a registered assumed business name withdraws from the business or dies; or

(4) the registrant wishes to change the name of a registered assumed business name.

History: En Sec. 9, Ch. 260, L. 1979.

30-13-210. Filing amendment to registration of assumed business name — issuance of certificate thereon. (1) Duplicate originals of amendment to the registration of an assumed business name, executed and verified on forms furnished by the secretary of state, shall be delivered to the secretary of state. The application for amended registration of an assumed business name shall include but not be limited to the following information:

(a) complete assumed business name prior to adoption of amendment;

(b) complete new assumed business name, if applicable;

(c) name and address of the registrant, including street name and number of the business office;

(d) if the name of any person having an interest in the business with a registered assumed business name is to be changed, the new name of the person having an interest in the business with such registered assumed business name;

(e) the name of the county or counties in which the name is being used;

(f) if there is a change in the identity of the county or counties or addition of a county or counties in which the assumed business name is being used or is to be used, the name(s) of the new county or counties;

(g) if a person or persons having an interest in a business with a registered assumed name withdraws or dies, a statement of such fact; and

(h) a statement that the amended registration of assumed business name supersedes the original registration and all amendments thereto.

(2) If the secretary of state finds that the application for amended registration of assumed business name complies with this part, he shall, when all fees have been paid as provided in this part:

(a) endorse on each of the duplicate originals the word "filed" and the month, day, and year of the filing thereof;

(b) file one of the duplicate originals in his office; and

(c) issue a certificate of amendment, to which he shall affix the other duplicate original.

(3) The certificate of amendment, together with the duplicate original of the amendment affixed thereto by the secretary of state, shall be returned to the registrant.

(4) The failure of the registrant of an assumed business name to comply with the requirements of this section shall result in the cancellation by the secretary of state of the registration.

History: En Sec. 10, Ch. 260, L. 1979.

30-13-211. Reservation of proposed assumed business name. Any authorized person who has not commenced business but intends to commence business may reserve an assumed business name which is not in conflict with the provisions of 30-13-202 for a term of 120 days by delivering to the secretary of state, on forms furnished by the secretary of state, an application for reservation of an assumed business name, including but not limited to the following information:

(1) the complete assumed business name to be reserved;

(2) the name and address, including street name and number, if any, of applicant;

(3) the date applicant intends to commence business;

(4) description of business applicant intends to transact; and

(5) the county or counties in which applicant intends to conduct business.

History: **En Sec. 11, Ch. 260, L. 1979.**

30-13-212. Filing application for reservation of assumed business name — issuance of certificate thereon. (1) Duplicate originals of application for reservation of an assumed business name, duly executed and verified by the applicant, shall be delivered to the secretary of state. If the secretary of state finds the application complies with the provisions of this part, he shall, when all fees have been paid as provided in this part:

(a) endorse on each of the duplicate originals the word "filed" and the month, day, and year of the filing thereof;

(b) file one of the duplicate originals in his office;

(c) issue a certificate of reservation, to which he shall affix the other duplicate original.

(2) The certificate of reservation, together with the duplicate original of application for reservation of an assumed business name affixed thereto by the secretary of state, shall be returned to the applicant.

History: **En Sec. 12, Ch. 260, L. 1979.**

30-13-213. Voluntary cancellation of registration of assumed business name. (1) When the registrant of record of a registered assumed business name wishes to cancel such registration, he shall deliver to the secretary of state an executed and verified original affidavit of cancellation of registration of an assumed business name, which shall include but not be limited to the following information:

(a) complete name of the registered assumed business name to be canceled; and

(b) name and address, including the street name and number, if any, of the registrant of record.

(2) If the secretary of state finds the affidavit complies with the provisions of this section, he shall file it in his office and mail a letter of acknowledgment of such filing to the registrant of record.

History: **En Sec. 13, Ch. 260, L. 1979.**

30-13-214. Cancellation of registration of assumed business name upon dissolution of domestic corporation — withdrawal or revocation of foreign corporation's authority to transact business. (1) If the only party of interest of an assumed business name is a domestic corporation which has been dissolved, the secretary of state shall cancel the registration.

(2) If the only party of interest of an assumed business name is a foreign corporation whose authority to transact business in this state has been withdrawn or revoked, the secretary of state shall cancel the registration.

History: **En Sec. 14, Ch. 260, L. 1979.**

30-13-215. Effect of failing to file application for registration of assumed business name. No person or persons conducting or transacting business in this state without an effective certificate of registration of an assumed business name or having any interest therein may maintain any suit or action in any of the courts of this state under such name.

History: **En Sec. 15, Ch. 260, L. 1979.**

30-13-216. Evidentiary effect of certificates and documents of secretary of state. All certificates issued by the secretary of state in accordance with the provisions of this part and all copies of documents filed in his office in accordance with the provisions of this part when certified by him shall be taken and received in all courts, public offices, and official bodies as prima facie evidence of the facts stated therein.

History: **En Sec. 16, Ch. 260, L. 1979.**

30-13-217. Fees for filing documents and issuing certificates. The secretary of state shall collect for:

(1) filing application for registration of assumed business name and issuing certificate thereon, $15;

(2) filing application for renewal of registration of assumed business name and issuing certificate thereon, $10;

(3) filing amendment to registration of assumed business name and issuing certificate thereon, $10;

(4) filing application for reservation of assumed business name and issuing certificate thereon, $15; and

(5) filing any other instrument not provided for in this section, $5.

History: **En Sec. 17, Ch. 260, L. 1979.**

Part 3

Trademarks

30-13-301. Definitions. In this part, unless the context requires otherwise, the following definitions apply:

(1) "Trademark" means any word, name, symbol, device, or any combination thereof adopted and used by a person to identify goods made or sold by him and to distinguish them from goods made or sold by others.

(2) "Service mark" means a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others.

(3) "Mark" means any trademark or service mark entitled to registration under this part whether registered or not.

(4) "Trade name" means a word, name, symbol, device, or any combination thereof used by a person to identify his business, vocation, or occupation and distinguish it from the business, vocation, or occupation of others.

(5) "Person" means any individual, firm, partnership, corporation, association, union, or other organization.

(6) "Applicant" means the person filing an application for registration of a trademark under this part or his legal representatives, successors, or assigns.

(7) "Registrant" means the person to whom the registration of a trademark under this part is issued or his legal representatives, successors, or assigns.

History: **En. Sec. 1, Ch. 429, L. 1979.**

Compiler's Comments

Savings. Sec. 20, Ch. 429, L. 1979, provided: "This act does not affect any right which matured or proceeding which was commenced prior to July 1, 1980."

Severability. Sec. 21, Ch. 429, L. 1979, was a severability clause.

Effective date. Sec. 23, Ch. 429, L. 1979, provided: "This act is effective on July 1, 1980."

30-13-302. When mark considered used in this state. For purposes of this part, a mark is considered to be used in this state:

(1) on goods when it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto and such goods are sold or otherwise distributed in the state; and

(2) on services when it is used or displayed in the sale or advertising of services and the services are rendered in this state.

History: **En. Sec. 2, Ch. 429, L. 1979.**

30-13-303. Registrability. (1) A mark by which the goods or services of any applicant for registration may be distinguished from the goods or services of others may not be registered if it:

(a) comprises immoral, deceptive, or scandalous matter; or

(b) comprises matter which may disparage or falsely suggest a connection with persons, living or dead, or institutions, beliefs, or national symbols or bring them into contempt or disrepute; or

(c) comprises the flag or coat of arms or other insignia of the United States, of any state or municipality, or of any foreign nation or any simulation thereof; or

(d) comprises the name, signature, or portrait of any living individual, except with his written consent; or

(e) comprises a mark that:

(i) when applied to the goods or services of the applicant, is merely descriptive or deceptively misdescriptive of them;

(ii) when applied to the goods or services of the applicant is primarily geographically descriptive or deceptively misdescriptive of them; or

(iii) is primarily merely a surname; or

(f) comprises a mark that so resembles a mark registered in this state or a mark or trade name previously used in this state by another and not abandoned as to be likely, when applied to the goods or services of the applicant, to cause confusion or mistake or to deceive.

(2) However, nothing in subsection (1)(e) prevents the registration of a mark used in this state by the applicant which has become distinctive of the applicant's goods or services. The secretary of state may accept as evidence that the mark has become distinctive, as applied to the applicant's goods or services, proof of continuous use thereof as a mark by the applicant in this state or elsewhere for the 5 years immediately preceding the date of the filing of the application for registration.

History: **En. Sec. 3, Ch. 429, L. 1979.**

30-13-304 through 30-13-310 reserved.

30-13-311. Application for registration. (1) Subject to the limitaons set forth in this part, a person who adopts and uses a mark in this state may file in the office of secretary of state, on a form to be furnished by the secretary of state, an application for registration of that mark setting forth nformation including but not limited to the following:

(a) the name and business address of the person applying for such registration and, if a corporation, the state of incorporation;

(b) the essential feature of the mark to be registered;

(c) the goods or services in connection with which the mark is used and he mode or manner in which the mark is used in connection with such goods r services and the class in which such goods or services fall;

(d) the date when the mark was first used anywhere and the date when t was first used in this state by the applicant or his predecessor in business;

(e) a statement that the mark is presently in use in this state by the pplicant; and

(f) a statement that the applicant is the owner of the mark and that no ther person has the right to use the mark in this state either in the identical orm thereof or in a form that so nearly resembles it that it might be calcuated to deceive or might be mistaken for it.

(2) The application must be signed and verified by affidavit of the appliant or a member of the firm or an officer of the corporation or association pplying.

(3) The application must be accompanied by a specimen or facsimile of uch mark in duplicate.

(4) The application for registration must be accompanied by a filing fee f $20, payable to the secretary of state.

History: **En. Sec. 4, Ch. 429, L. 1979.**

30-13-312. Filing application and issuing certificate of registration. (1) Duplicate originals of an application for registration of a mark must be delivered to the secretary of state. If the secretary of state finds that he application complies with the requirements of this part, he shall, when ll fees have been paid as prescribed in this part:

(a) endorse on each such duplicate original the words “filed for record” nd the month, day, and year of the filing thereof;

(b) file one such duplicate original in his office; and

(c) issue a certificate of registration to which he shall affix the other duplicate original.

(2) The certificate of registration, together with the duplicate original of he application for registration of mark affixed thereto, shall be returned to he applicant.

(3) Any certificate of registration issued by the secretary of state under he provisions of this section or a copy thereof duly certified by the secretary of state is admissible in evidence as competent and sufficient proof of the egistration of such mark in any judicial proceeding in any court of this state.

History: **En. Sec. 5, Ch. 429, L. 1979.**

30-13-313. Duration and renewal. (1) Registration of a mark under this part is effective for a term of 10 years from the date of registration and, upon application filed within 6 months prior to the expiration of such term, the registration may be renewed for another 10 years.

(2) An application for renewal of mark registration must be delivered to the secretary of state and shall set forth information including but not limited to the following:

(a) the name and business address of the applicant;

(b) a description of the mark; and

(c) a statement that the mark is still in use by the applicant in this state.

(3) The application for renewal of mark registration must be signed and verified by affidavit of the applicant.

(4) The application for renewal of mark registration must be accompanied by a filing fee of $20, payable to the secretary of state.

History: **En. Sec. 6, Ch. 429, L. 1979.**

30-13-314. Filing application for renewal of registration — issuing certificate of renewal. (1) Duplicate originals of an application for renewal of mark registration must be delivered to the secretary of state. If the secretary of state finds that the application complies with the requirements of this part, he shall, when all fees have been paid as prescribed in this part:

(a) endorse on each such duplicate original the words "filed for record" and the month, day, and year of the filing thereof;

(b) file one such duplicate original in his office; and

(c) issue a certificate of registration to which he shall affix the other duplicate original.

(2) The certificate of renewal of registration, together with the duplicate original of the application for renewal of registration of the mark affixed thereto, shall be returned to the applicant.

(3) A mark registration may be renewed for successive periods of 10 years in the manner provided for in subsections (1) and (2).

(4) The secretary of state shall notify registrants of marks of the necessity of renewal within the year immediately preceding the expiration of the 10 years from the date of registration, by writing to the last-known address of the registrants.

(5) Any registration in force on July 1, 1979, expires 10 years from the date of the registration or from the date of the last renewal thereof or on July 1, 1980, whichever is later, if renewal of mark registration is not effected in the manner provided for in this part.

(6) The secretary of state shall, by January 1, 1981, notify each person who registered a mark prior to July 1, 1980, of the date of expiration of such registration unless renewed in accordance with the provisions of this part, by writing to the last-known address of the registrant.

History: **En. Sec. 7, Ch. 429, L. 1979.**

30-13-315. Assignment. (1) Any mark and its registration under this part may be assigned in conjunction with the good will of the business in which the mark is used or with that part of the good will of the business connected with the use of and symbolized by the mark for the remainder of the erm of the current registration. An assignment of any registration under this art is void as against any subsequent purchaser for valuable consideration ithout notice unless it is recorded with the secretary of state within 3 onths after the date of the assignment or prior to such subsequent purase.

(2) Duplicate originals of an assignment of a mark must be delivered to e secretary of state and shall set forth information including but not mited to the following:

(a) the name and address of the assignor;

(b) the name and address of the assignee;

(c) the registration number of the mark; and

(d) the date of registration.

(3) The assignment of a mark must be signed and verified by the ssignor.

(4) The assignment of a mark must be accompanied by a filing fee of $20, ayable to the secretary of state.

History: **En. Sec. 8, Ch. 429, L. 1979.**

30-13-316. Filing of assignment — issuing certificate of assignent. (1) Duplicate originals of the assignment of a mark must be delivered the secretary of state. If the secretary of state finds that the assignment omplies with the requirements of this part, he shall, when all fees have been aid as prescribed in this part:

(a) endorse on each such duplicate original the words "filed for record" nd month, day, and year of the filing thereof;

(b) file one such duplicate original in his office;

(c) issue a certificate of assignment to which he shall affix the other uplicate original.

(2) The certificate of assignment, together with the duplicate original of ssignment of a mark affixed thereto, shall be returned to the assignee.

History: **En. Sec. 9, Ch. 429, L. 1979.**

30-13-317. Records. The secretary of state shall keep for public examnation a record of all marks registered or renewed under this part.

History: **En. Sec. 10, Ch. 429, L. 1979.**

30-13-318. Cancellation. The secretary of state shall cancel from the egister:

(1) after July 1, 1981, each registration made prior to July 1, 1980, that s more than 10 years old and not renewed in accordance with this part;

(2) any registration concerning which the secretary of state receives a oluntary request for cancellation from the registrant or the assignee of ecord;

(3) each registration granted under this part and not renewed in accorance with the provisions of this part;

(4) any registration concerning which a court of competent jurisdiction inds that:

(a) the registered mark has been abandoned;

(b) the registrant is not the owner of the mark;
(c) the registration was granted improperly;
(d) the registration was obtained fraudulently;
(e) the registered mark is so similar to a mark currently registered by another person in the United States patent and trademark office prior to the filing date of the application for registration under this part as to be likely to cause confusion or mistake or to deceive. However, if the registrant proves that he is the owner of a concurrent registration of his mark in the United States patent and trademark office covering an area including this state, the registration under this part may not be canceled.
(5) a registration ordered canceled by a court of competent jurisdiction on any grounds.

History: **En. Sec. 11, Ch. 429, L. 1979.**

30-13-319 through 30-13-330 reserved.

30-13-331. Classification. (1) The following general classes of goods and services are established for convenience of administration of this part. This classification does not limit or extend the applicant's or registrant's rights. A single application for registration of a mark may include any or all goods or services comprised in a single class with regard to which the mark is actually being used. However, in no event may a single application include goods or services that fall within different classes of goods or services.

(2) The classes of goods are as follows:
(a) raw or partly prepared materials;
(b) receptacles;
(c) baggage, animal equipments, portfolios, and pocketbooks;
(d) abrasive and polishing materials;
(e) adhesives;
(f) chemicals and chemical compositions;
(g) cordage;
(h) smokers' articles, not including tobacco products;
(i) explosives, firearms, equipment, and projectiles;
(j) fertilizers;
(k) inks and inking materials;
(l) construction materials;
(m) hardware and plumbing and steamfitting supplies;
(n) metals and metal casting and forgings;
(o) oils and greases;
(p) paints and painters' materials;
(q) tobacco products;
(r) medicines and pharmaceutical preparations;
(s) vehicles;
(t) linoleum and oil cloth;
(u) electrical apparatus, machines, and supplies;
(v) games, toys, and sporting goods;
(w) cutlery, machinery, and tools, and parts thereof;
(x) laundry appliances and machines;
(y) locks and safes;
(z) measuring and scientific appliances;

(aa) horological instruments;
(bb) jewelry and precious metal ware;
(cc) brooms, brushes, and dusters;
(dd) crockery, earthenware, and porcelain;
(ee) filters and refrigerators;
(ff) furniture and upholstery;
(gg) glassware;
(hh) heating, lighting, and ventilating apparatus;
(ii) belting, hose, machinery packing, and nonmetallic tires;
(jj) musical instruments and supplies;
(kk) paper and stationery;
(ll) prints and publications;
(mm) clothing;
(nn) fancy goods, furnishings, and notions;
(oo) canes, parasols, and umbrellas;
(pp) knitted, netted, and textile fabrics, and substitutes therefor;
(qq) thread and yarn;
(rr) dental, medical, and surgical appliances;
(ss) soft drinks and carbonated waters;
(tt) foods and ingredients of foods;
(uu) wines;
(vv) malt beverages and liquors;
(ww) distilled alcoholic liquors;
(xx) merchandise not otherwise classified;
(yy) cosmetics and toilet preparations;
(zz) detergents and soaps.
(3) The classes of services are as follows:
(a) miscellaneous;
(b) advertising and business;
(c) insurance and financial;
(d) construction and repair;
(e) communications;
(f) transportation and storage;
(g) material treatment;
(h) education and entertainment.

History: En. Sec. 12, Ch. 429, L. 1979.

30-13-332. Fraudulent registration. Any person who, for himself or on behalf of any other person, procures the filing or registration of any mark in the office of the secretary of state under the provisions of this part by knowingly making any false or fraudulent representation, verbally or in writing or by any other fraudulent means, is liable to pay all damages sustained in consequence of such filing or registration. Such damages may be recovered by or on behalf of the injured party in any court of competent jurisdiction.

History: En. Sec. 13, Ch. 429, L. 1979.

30-13-333. Infringement. (1) Subject to the provisions of 30-13-336, any person is liable in a civil action brought by the lawful owner of a registered mark under 30-13-335 if such person:

(a) uses, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of a mark registered under this part in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive as to the source of origin of such goods or services; or

(b) reproduces, counterfeits, copies, or colorably imitates any such mark and applies such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in conjunction with the sale or other distribution in this state of such goods or services.

(2) However, the registrant is not entitled to recover under subsection (1)(b) any profits or damages unless the acts have been committed with knowledge that such mark is intended to be used to cause confusion or mistake or to deceive.

History: En. Sec. 14, Ch. 429, L. 1979.

30-13-334. Injury to business reputation — dilution. Likelihood of injury to business reputation or of dilution of the distinctive quality of a mark registered under this part or a mark valid at common law or a trade name valid at common law is grounds for injunctive relief notwithstanding the absence of competition between the parties or the absence of confusion as to the source of goods or services.

History: En. Sec. 15, Ch. 429, L. 1979.

30-13-335. Remedies. (1) Any owner of a mark registered under this part may proceed by suit to enjoin the manufacture, use, display, or sale of any counterfeits or imitations of the mark. Any court of competent jurisdiction may grant injunctions to restrain such manufacture, use, display, or sale as is considered by the court to be just and reasonable. The court may require the defendants to pay to such owner all profits derived from and/or all damages suffered by reason of such wrongful manufacture, use, display, or sale. The court may also order that any such counterfeits or imitations in the possession or under the control of any defendant in such case be delivered to an officer of the court or to the complainant to be destroyed.

(2) The enumeration in this part of any right or remedy does not affect a registrant's right to prosecute under any criminal law of this state.

History: En. Sec. 16, Ch. 429, L. 1979.

30-13-336. Common-law rights. Nothing in this part adversely affects the rights or the enforcement of rights in marks acquired at common law in good faith at any time.

History: En. Sec. 17, Ch. 429, L. 1979.

CHAPTER 14

UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION

Part 1 — Consumer Protection Act

Section
30-14-101. Short title.
30-14-102. Definitions.

0-14-103. Unlawful practices.
0-14-104. Federal interpretation — rules determining unfair competition and deception.
0-14-105. Exemptions.
Sections 30-14-106 through 30-14-110 reserved.
0-14-111. Department to restrain unlawful acts.
0-14-112. Assurance of compliance.
0-14-113. Investigative demand.
0-14-114. Department authority.
0-14-115. Service of process — how made.
Sections 30-14-116 through 30-14-120 reserved.
0-14-121. Duties of county attorney and attorney general.
0-14-122. Employment of investigator by county attorney.
Sections 30-14-123 through 30-14-130 reserved.
0-14-131. Restoration.
0-14-132. Powers of receiver — proof of damages — jurisdiction.
0-14-133. Damages — notice to public agencies — attorney fees — prior judgment as evidence.
0-14-134. Enforcement of department orders — contempt.
Sections 30-14-135 through 30-14-140 reserved.
0-14-141. Dissolution or forfeiture of corporate franchise.
0-14-142. Penalties.

Part 2 — Unfair Trade Practices

0-14-201. Purpose.
0-14-202. Definitions.
0-14-203. Persons responsible.
0-14-204. Proof of intent.
0-14-205. Unlawful restraint of trade.
0-14-206. Labor excepted.
0-14-207. Unfair competition in sales.
0-14-208. Unfair competition in purchasing.
0-14-209. Sales at less than cost forbidden.
0-14-210. Cost survey as evidence of cost.
0-14-211. Establishing cost survey.
0-14-212. Forced sales not basis of cost price.
0-14-213. Sales excepted.
0-14-214. Fair price for agricultural products.
0-14-215. Rebates forbidden.
0-14-216. Pooling of grain prohibited.
0-14-217. Destruction of food.
0-14-218. Alteration of invoices prohibited.
0-14-219. Recovery on illegal contracts forbidden.
0-14-220. Enforcement by department.
0-14-221. Investigations.
0-14-222. Injunctions — damages — production of evidence.
0-14-223. Department to institute suit.
0-14-224. Penalties.

Parts 3 and 4 reserved

Part 5 — Personal Solicitation Sales

0-14-501. Purpose.
0-14-502. Definitions.
0-14-503. Disclosure obligation.
0-14-504. Buyer's right to cancel — time allowed — notice — return of goods.
0-14-505. Notice of right to cancel.
0-14-506. Repayment to buyer — retention of goods by buyer.
0-14-507. Redelivery of goods.
0-14-508. Violation.

Part 6 — Sale of Imitation Indian Articles

30-14-601. Definitions.
30-14-602. Articles to be designated and segregated.
30-14-603. Designation of authenticity.
30-14-604. Violation as misdemeanor.

Part 7 — Fraudulent Financing of Mining and Oil Companies

30-14-701. Mining and oil companies — fraudulent handling of finances.
30-14-702. Application.
30-14-703. Investigation of complaints.
30-14-704. Penalty.

Part 1

Consumer Protection Act

30-14-101. Short title. This part shall be cited as the "Montana Unfair Trade Practices and Consumer Protection Act of 1973".

History: **En. Sec. 19, Ch. 275, L. 1973; R.C.M. 1947, 85-418.**

30-14-102. Definitions. As used in this part, the following definitions apply:

(1) "Department" means the department of business regulation created in 2-15-1801.

(2) "Documentary material" means the original or a copy of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or recording, wherever situate.

(3) "Examination" of documentary material includes the inspection, study, or copying of such material and the taking of testimony under oath or acknowledgment in respect to any such documentary material or copy thereof.

(4) "National advertising" means any advertising run simultaneously in five or more states and over which a local advertiser has no control.

(5) "Person" means natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.

(6) "Trade" and "commerce" mean the advertising, offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity, or thing of value, wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this state.

History: **En. Sec. 1, Ch. 275, L. 1973; R.C.M. 1947, 85-401.**

30-14-103. Unlawful practices. Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful.

History: **En. Sec. 2, Ch. 275, L. 1973; R.C.M. 1947, 85-402.**

30-14-104. Federal interpretation — rules determining unfair competition and deception. (1) It is the intent of the legislature that in construing 30-14-103 due consideration and weight shall be given to the interpretations of the federal trade commission and the federal courts relating to section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C., 45(a)(1)), as amended.

(2) The department may make rules interpreting the provisions of 30-14-103. Such rules shall not be inconsistent with the rules, regulations, and decisions of the federal trade commission and the federal courts in interpreting the provisions of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C., 45(a)(1)), as amended.

History: **En. Sec. 3, Ch. 275, L. 1973; R.C.M. 1947, 85-403.**

30-14-105. Exemptions. Nothing in this part shall apply to:

(1) actions or transactions permitted under laws administered by the Montana public service commission acting under statutory authority of this part or the United States;

(2) acts done by the retail merchants, publisher, owner, agent, or employee of a newspaper, periodical, or radio or television station or advertising agency in the publication or dissemination of an advertisement, when the owner, agent, or employee did not have knowledge of the false, misleading, or deceptive character of the advertisement and did not have a direct financial interest in the advertised product or service;

(3) national advertising.

History: **En. Sec. 4, Ch. 275, L. 1973; R.C.M. 1947, 85-404.**

30-14-106 through 30-14-110 reserved.

30-14-111. Department to restrain unlawful acts. (1) Whenever the department has reason to believe that any person is using, has used, or is about to knowingly use any method, act, or practice declared by 30-14-103 to be unlawful and that proceeding would be in the public interest, the department may bring an action in the name of the state against such person to restrain by temporary or permanent injunction or temporary restraining order the use of such method, act, or practice, upon the giving of appropriate notice to that person.

(2) The notice must state generally the relief sought and be served in accordance with 30-14-115 at least 20 days before the hearing of the action where the relief to be sought is a temporary or permanent injunction. The notice for a temporary restraining order is governed by 27-19-315.

(3) The action may be brought in the district court in which such person resides or has his principal place of business or, with consent of the parties, may be brought in the district court of Lewis and Clark County.

(4) The courts are authorized to issue temporary or permanent injunctions or temporary restraining orders to restrain and prevent violations of this part, and such injunctions shall be issued without bond.

History: **En. Sec. 5, Ch. 275, L. 1973; R.C.M. 1947, 85-405; amd. Sec. 1, Ch. 394, L. 1979.**

Compiler's Comments

Codification. Sec. 3, Ch. 394, L. 1979, provided: "If Senate Bill 243 becomes law, the reference in section 1, subsection (2), of this act to 27-19-305 shall be changed by the code commissioner to a reference to section 7 of Senate Bill 243." Senate Bill 243 was approved March 31, 1979.

30-14-112. Assurance of compliance. In the administration of this part, the department may accept an assurance of voluntary compliance with respect to any method, act, or practice considered to be violative of this part from any person who has engaged or was about to engage in any such method, act, or practice. Any such assurance shall be in writing and be filed with and subject to the approval of the district court of the county in which the alleged violator resides or has his principal place of business or the district court of Lewis and Clark County. Assurance of voluntary compliance is not an admission of violation for any purpose. Matters thus closed may at any time be reopened by the department for further proceedings in the public interest, pursuant to 30-14-111.

History: En. Sec. 9, Ch. 275, L. 1973; amd. Sec. 10, Ch. 265, L. 1977; R.C.M. 1947, 85-409.

30-14-113. Investigative demand. (1) When it appears to the department that the person has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this part or when the department believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this part, the department may execute in writing and cause to be served upon any person who is believed to have information, documentary material, or physical evidence relevant to the alleged or suspected violation an investigative demand requiring such person to furnish, under oath or otherwise, a report in writing setting forth the relevant facts and circumstances of which he has knowledge or to appear and testify or produce relevant documentary material or physical evidence for examination, at such reasonable time and place as may be stated in the investigative demand, concerning the advertisement, sale, or offering for sale of any goods or services or the conduct of any trade or commerce that is the subject matter of the investigation.

(2) At any time before the return date specified in an investigative demand or within 20 days after the demand has been served, whichever period is shorter, a petition to extend the return date or to modify or set aside the demand, stating good cause, may be filed in the district court of the county in which the person served with the demand resides or has his principal place of business or in the district court of Lewis and Clark County.

History: En. Sec. 10, Ch. 275, L. 1973; amd. Sec. 11, Ch. 265, L. 1977; R.C.M. 1947, 85-410.

30-14-114. Department authority. To accomplish the objectives and to carry out the duties prescribed by this part, the department, in addition to other powers conferred upon it by this part, may issue subpoenas to any person, administer an oath or affirmation to any person, conduct hearings in aid of any investigation or inquiry, prescribe forms, and promulgate rules as may be necessary, which rules shall have the force of law; provided that none of the powers conferred by this part may be used for the purpose of compelling any natural person to furnish testimony or evidence which might tend to incriminate him or subject him to a penalty or forfeiture. Information obtained pursuant to the powers conferred by this part shall not be made public or disclosed by the department or its employees beyond the extent necessary for law enforcement purposes in the public interest.

History: En. Sec. 11, Ch. 275, L. 1973; R.C.M. 1947, 85-411.

30-14-115. Service of process — how made. Service of any notice, lemand, or subpoena under this part shall be made personally within this tate, but if such cannot be obtained, substitute service may be made in the nanner provided in the Montana Rules of Civil Procedure.

History: En. Sec. 12, Ch. 275, L. 1973; R.C.M. 1947, 85-412.

30-14-116 through 30-14-120 reserved.

30-14-121. Duties of county attorney and attorney general. It is he duty of the county attorney to lend to the department such assistance is the department may request in the commencement and prosecution of ictions pursuant to this part. The county attorney or the attorney general, n request of the department or a county attorney, may initiate all procelures and prosecute actions in the same manner as provided for the departnent. If an action is prosecuted by the county attorney alone or the attorney general on request of the county attorney, the person prosecuting shall notify he department as to the nature of the action and the parties to the action within 30 days of the filing of the action. The county attorney or attorney general shall make a report thereon to the department within 30 days of the inal disposition of the matter.

History: En. Sec. 16, Ch. 275, L. 1973; amd. Sec. 1, Ch. 407, L. 1977; R.C.M. 1947, 85-416.

30-14-122. Employment of investigator by county attorney. The ounty attorney in first- and second-class counties may designate an mployee to act as a full-time investigator.

History: En. Sec. 17, Ch. 275, L. 1973; R.C.M. 1947, 85-417.

30-14-123 through 30-14-130 reserved.

30-14-131. Restoration. The court may make such additional orders or judgments as may be necessary to restore to any person any moneys or property, real or personal, which may have been acquired by means of any practice in this part declared to be unlawful, including the appointment of a receiver or the revocation of a license or certificate authorizing that person to engage in business in this state, or both.

History: En. Sec. 6, Ch. 275, L. 1973; R.C.M. 1947, 85-406.

30-14-132. Powers of receiver — proof of damages — jurisdiction. (1) When a receiver is appointed by the court pursuant to this part, he has the power to sue for, collect, receive, and take into his possession all goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes, and property of every description derived by means of any practice declared to be illegal and prohibited by this part, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court.

(2) Any person who has suffered damages as a result of the use or employment of any unlawful practice and submits proof to the satisfaction of the court that he has in fact been damaged may participate with general

creditors in the distribution of the assets to the extent he has sustained out-of-pocket losses.

(3) In the case of a partnership or business entity, the receiver shall settle the estate and distribute the assets under the direction of the court.

(4) The court has jurisdiction of all questions arising in the proceedings and may make orders and judgments as may be required.

History: **En. Sec. 7, Ch. 275, L. 1973; amd. Sec. 8, Ch. 265, L. 1977; R.C.M. 1947, 85-407.**

30-14-133. Damages — notice to public agencies — attorney fees — prior judgment as evidence. (1) Any person who purchases or leases goods or services primarily for personal, family, or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act, or practice declared unlawful by 30-14-103 may bring an individual but not a class action under the rules of civil procedure in the district court of the county in which the seller or lessor resides or has his principal place of business or is doing business to recover actual damages or $200, whichever is greater. The court may, in its discretion, award up to three times the actual damages sustained and may provide such equitable relief as it considers necessary or proper.

(2) Upon commencement of any action brought under subsection (1) of this section, the clerk of court shall mail a copy of the complaint or initial pleading to the department and the appropriate county attorney and, upon entry of any judgment or decree in the action, shall mail a copy of such judgment or decree to the department and the appropriate county attorney.

(3) In any action brought under this section, the court may award the prevailing party reasonable attorney fees incurred in prosecuting or defending the action.

(4) Any permanent injunction, judgment, or order of the court made under 30-14-111 shall be prima facie evidence in an action brought under this section that the respondent used or employed a method, act, or practice declared unlawful by 30-14-103.

History: **En. Sec. 8, Ch. 275, L. 1973; amd. Sec. 9, Ch. 265, L. 1977; R.C.M. 1947, 85-408.**

30-14-134. Enforcement of department orders — contempt. If any person fails or refuses to file any statement or report or obey any subpoena or investigative demand issued by the department, the department may, after notice, apply to the district court and, after hearing thereon, request an order:

(1) granting injunctive relief to restrain the person from engaging in the advertising or sale of any merchandise or the conduct of any trade or commerce that is involved in the alleged or suspected violation;

(2) vacating, annulling, or suspending the corporate charter of a corporation created by or under the laws of this state; revoking or suspending the certificate of authority to do business in this state of a foreign corporation; or revoking or suspending any other licenses, permits, or certificates issued pursuant to law to such person which are used to further the allegedly unlawful practice; and

(3) granting such other relief as may be required until the person files the tatement or report or obeys the subpoena or investigative demand. Any disobedience of any final order entered under this section by any court shall be punished as a contempt thereof.

History: En. Sec. 13, Ch. 275, L. 1973; R.C.M. 1947, 85-413.

30-14-135 through 30-14-140 reserved.

30-14-141. Dissolution or forfeiture of corporate franchise. Upon petition by the department, the district court may, in its discretion, order the dissolution, suspension, or forfeiture of franchise of any corporation which violates the terms of any injunction issued under 30-14-111.

History: En. Sec. 15, Ch. 275, L. 1973; R.C.M. 1947, 85-415.

30-14-142. Penalties. (1) A person who violates the terms of an njunction or temporary restraining order issued under 30-14-111 shall forfeit and pay to the state a civil penalty of not more than $10,000 per violation. For the purposes of this section, the district court issuing an injunction or emporary restraining order retains jurisdiction and the cause shall be continued, and in such cases the department acting in the name of the state may petition for recovery of civil penalties.

(2) In an action brought under 30-14-111, if the court finds that a person is willfully using or has willfully used a method, act, or practice declared unlawful by 30-14-103, the department, upon petition to the court, may recover on behalf of the state a civil penalty of not more than $500 per violation.

(3) A person who engages in a fraudulent course of conduct declared unlawful by 30-14-103 shall upon conviction be fined not more than $2,000, mprisoned for not more than 1 year, or both, in the discretion of the court. Nothing in this subsection limits any other provision of this part.

(4) For purposes of this section, a willful violation occurs when the party committing the violation knew or should have known that his conduct was a violation of 30-14-103.

History: En. Sec. 14, Ch. 275, L. 1973; R.C.M. 1947, 85-414; amd. Sec. 8, Ch. 137, L. 1979; amd. Sec. 2, Ch. 394, L. 1979.

Part 2

Unfair Trade Practices

30-14-201. Purpose. The legislature declares that the purpose of this part is to safeguard the public against the creation or perpetuation of monopolies and foster and encourage competition by prohibiting unfair and discriminatory practices by which fair and honest competition is destroyed or prevented. This part shall be literally construed so that its beneficial purposes may be subserved.

History: En. Sec. 14, Ch. 80, L. 1937; Sec. 51-117, R.C.M. 1947; amd. and redes. 51-501 by Sec. 1, Ch. 518, L. 1977; R.C.M. 1947, 51-501.

30-14-202. Definitions. As used in this part, unless the context indicates otherwise, the following definitions apply:

(1) "Article of commerce" includes but is not limited to any commodity, product, service or output of a service trade, or any product of the soil. A product or service of a public utility is not included within the term "article of commerce".

(2) "Business" includes any person, as defined in (8), domestic or foreign, engaged in the production, manufacture, distribution, purchasing, or sale of any article of commerce within the state of Montana.

(3) "Cost", as applied to production, includes the cost of raw materials, labor, and all overhead expenses of the producer.

(4) "Cost", as applied to distribution, means either the invoice price of the article or product sold or the cost to the dealer or vendor for replacing the article or product in the quantity last purchased within 90 days prior to the sale of the article or product, whichever is lesser, less all trade discounts except customary cash discounts plus the cost of doing business by the vendor.

(5) "Cost of doing business" or "overhead expense" includes all costs of doing business incurred in the conduct of a business and includes, without being limited to, the following items of expense:

(a) labor (including salaries of executives and officers);
(b) rent;
(c) interest on borrowed capital;
(d) depreciation;
(e) selling cost;
(f) maintenance of equipment;
(g) delivery costs;
(h) credit losses;
(i) all types of licenses;
(j) taxes;
(k) insurance and advertising.

(6) "Customary cash discount" means any allowance not exceeding 2%, whether a part of a larger discount or not, made to a wholesale or retail vendor when such vendor pays for merchandise within a limited or specified time.

(7) "Department" means the department of business regulation provided for in 2-15-1801.

(8) "Person" includes any person, partnership, firm, corporation, joint-stock company, or other association engaged in business within this state.

(9) "Vendor" includes not only any person acting as one known generally and legally as a vendor but also any person who performs work upon, renovates, alters, or improves any personal property belonging to another person.

History: En. 51-502 by Sec. 2, Ch. 518, L. 1977; R.C.M. 1947, 51-502.

30-14-203. Persons responsible. Any person who, either as director, officer, or agent of any firm or corporation or as agent of any person, assists or aids, directly or indirectly, in a violation of this part is responsible therefor equally with the person, firm, or corporation for whom or which he acts.

History: En. Sec. 2, Ch. 80, L. 1937; Sec. 51-102, R.C.M. 1947; amd. and redes. 51-503 by Sec. 3, Ch. 518, L. 1977; R.C.M. 1947, 51-503.

30-14-204. Proof of intent. In an injunction proceeding or in the prosecution of a person acting as an officer, director, or agent, it is sufficient to allege and prove the unlawful intent of the person, firm, or corporation for whom or which he acts.

History: En. 51-504 by Sec. 4, Ch. 518, L. 1977; R.C.M. 1947, 51-504.

30-14-205. Unlawful restraint of trade. It is unlawful for a person or group of persons, directly or indirectly:

(1) to enter an agreement for the purpose of fixing the price or regulating the production of an article of commerce;

(2) for the purpose of creating or carrying out any restriction in trade, to:

(a) limit productions;

(b) increase or reduce the price of merchandise or commodities;

(c) prevent competition in the distribution or sale of merchandise or commodities;

(d) fix a standard or figure whereby the price of an article of commerce intended for sale, use, or consumption will be in any way controlled;

(e) agree to add to a bid for any contract an amount, fixed by percentage or otherwise, for the purpose of making a refund or sharing costs of bidding with any other bidder;

(f) return a part of any amount added to a bid by collusive agreement among bidders to any person;

(g) create a monopoly in the manufacture, sale, or transportation of an article of commerce;

(h) enter into an agreement which binds any person not to manufacture, sell, or transport an article of commerce below a common standard or figure or which keeps such article or transportation at a fixed or graduated figure or by which the price of such article is settled so as to preclude unrestricted competition.

History: En. 51-505 by Sec. 5, Ch. 518, L. 1977; R.C.M. 1947, 51-505.

30-14-206. Labor excepted. The provisions of 30-14-205 do not apply to any arrangements, agreement, or combination between laborers made with the object of lessening the number of hours of labor or increasing wages.

History: En. Sec. 2, Ch. 97, L. 1909; re-en. Sec. 10902, R.C.M. 1921; re-en. Sec. 10902, R.C.M. 1935; Sec. 94-1105, R.C.M. 1947; redes. 51-402 by Sec. 29, Ch. 513, L. 1973; amd. and redes. 51-506 by Sec. 6, Ch. 518, L. 1977; R.C.M. 1947, 51-506.

30-14-207. Unfair competition in sales. (1) It is unlawful for any business, with the intent to destroy the competition of any regular established dealer of any article of commerce or to prevent the competition of any person who in good faith intends or attempts to become such dealer, to discriminate between different localities in this state by selling or furnishing such article at a lower rate in one locality than in another, after making allowance for difference, if any, in the grade, quality, quantity, and actual cost of transportation from the point of production or manufacture of the article.

(2) This section does not prohibit the meeting in good faith of a competitive rate or prevent a reasonable classification of service by public utilities for the purpose of establishing rates.

(3) The prohibition against locality discrimination includes any scheme of special rebates, collateral contracts, or any device of any nature whereby such discrimination is, in substance or fact, effected in violation of the spirit and intent of this section.

(4) Willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price stipulated in a contract entered into under this section, whether or not the person so advertising, offering for sale, or selling is a party to such contract, is unfair competition, and a person damaged thereby may bring an action.

History: **En. 51-507 by Sec. 7, Ch. 518, L. 1977; R.C.M. 1947, 51-507.**

30-14-208. Unfair competition in purchasing. (1) Any business which, for the purpose of creating a monopoly or destroying the business of a regularly established dealer or preventing the competition of any person who in good faith intends or attempts to become such dealer, discriminates between different persons or localities of this state by purchasing any article of commerce at a higher rate or price in one locality than in another, after making due allowance for the difference in the actual cost of transportation from the point of purchase to the point of manufacture, sale, storage, or distribution and for the difference in the grade and quality of such article, is guilty of unfair discrimination, which is prohibited and unlawful.

(2) Proof that any person has paid a higher rate or price for any article of commerce in one locality than in another, after making due allowance for the difference in the actual cost of transportation and for the difference in the grade and quality of such article, shall be prima facie evidence of a violation of this section.

(3) The payment of a higher rate or price in one locality than in another, after making such allowance provided above, is not unfair discrimination provided such higher rate or price is paid for the purpose of meeting the rate or price set by a competitor in such locality. The burden of proof of such fact is upon the person charged with unfair discrimination.

History: **En. 51-508 by Sec. 8, Ch. 518, L. 1977; R.C.M. 1947, 51-508.**

30-14-209. Sales at less than cost forbidden. It is unlawful for a vendor to sell, offer for sale, or advertise for sale any article of commerce at less than the cost thereof to the vendor or to give, offer to give, or advertise the intent to give away any article of commerce for the purpose of injuring competitors and destroying competition.

History: **En. 51-509 by Sec. 9, Ch. 518, L. 1977; R.C.M. 1947, 51-509.**

30-14-210. Cost survey as evidence of cost. Whenever a particular trade or industry, of which the person complained against is a member, has an established cost survey for the locality in which the offense is committed, such cost survey is competent evidence to be used in proving the costs of the person complained against.

History: **En. 51-510 by Sec. 10, Ch. 518, L. 1977; R.C.M. 1947, 51-510.**

30-14-211. Establishing cost survey. (1) The department shall, whenever application has been made by 10 or more persons within a particular trade or business, establish the cost survey provided for in 30-14-210. When petition for a cost survey has been so presented to the department, the lepartment shall, as soon as possible, fix a time for a public hearing upon he question of whether the cost survey should be established and, if so, pon the matter of establishing such cost survey. The hearing shall be held t the office of the department and upon that notice which the department nay require by rule. However, notice of the hearing shall be published for t least 2 successive weeks in the daily newspaper or newspapers as the lepartment may designate as most commonly circulated in the counties to be ffected by the cost survey. The notice shall further state the locality or area n respect to which the cost survey is proposed to be established and the paricular trade or business to be affected by it.

(2) At the time fixed in the notice any person may appear and be heard y the department upon all questions to be determined by it as provided in his section. If the department determines that a cost survey should be estabished, it shall at the same hearing proceed to classify and define the particlar trade or business, or parts thereof, to be affected, determine and delimit e particular area within which the trade or business will be affected, and ind and determine the probable cost of doing business or overhead expense, tated in percentage of invoice or replacement cost which would probably be ncurred by the most efficient person in the trade or business within the rea.

(3) If the department determines that the probable cost of doing business r overhead expense stated in percentage of invoice or replacement cost which would probably be incurred by the most efficient person in the trade r business is the same for the entire state, then the department may, upon roper notice given as provided in this section, create one trade area embracng the entire state.

(4) The percentage so determined shall be presumed to be the actual cost f doing business and overhead expense of any person in the trade or busiess and within the area affected by the cost survey.

History: En. Sec. 12A, Ch. 80, L. 1937, added by Sec. 2, Ch. 50, L. 1939; amd. Sec. 1, Ch. 21, . 1945; amd. Sec. 2, Ch. 129, L. 1949; amd. Sec. 122, Ch. 431, L. 1975; Sec. 51-114, R.C.M. 1947; md. and redes. 51-511 by Sec. 11, Ch. 518, L. 1977; R.C.M. 1947, 51-511.

30-14-212. Forced sales not basis of cost price. In establishing the ost of a given article or product to the distributor and vendor, the invoice ost of the article or product purchased at a forced, bankrupt, closeout, or ther sale outside of the ordinary channels of trade may not be used as a asis for justifying a price lower than one based upon the replacement cost s of the date of sale of the article or product replaced through the ordinary hannels of trade, unless:

(1) the article or product is kept separate from goods purchased in the rdinary channels of trade;

(2) the article or product is advertised and sold as merchandise purchased t a forced, bankrupt, or closeout sale or by means other than through the rdinary channels of trade and such advertising states the conditions under which the goods were purchased and the quantity of merchandise to be sold r offered for sale.

History: En. Sec. 4, Ch. 80, L. 1937; Sec. 51-104, R.C.M. 1947; amd. and redes. 51-512 by Sec. 12, Ch. 518, L. 1977; R.C.M. 1947, 51-512.

30-14-213. Sales excepted. Sections 30-14-209, 30-14-210, and 30-14-212 do not apply to any sale made:

(1) in closing out in good faith the owner's stock or any part thereof for the purpose of discontinuing his trade in any article of commerce;

(2) of seasonal goods;

(3) in good faith of perishable goods to prevent loss to the vendor by spoilage or depreciation, provided notice is given to the public thereof;

(4) when the goods are damaged or deteriorated in quality and notice is given to the public thereof;

(5) by an officer acting under the orders of any court;

(6) in a good faith endeavor to meet the legal prices of a competitor selling the same article of commerce in the same locality or trade area; or

(7) to the state of Montana or any of its institutions.

History: En. Sec. 6, Ch. 80, L. 1937; amd. Sec. 1, Ch. 100, L. 1941; Sec. 51-107, R.C.M. 1947; amd. and redes. 51-513 by Sec. 13, Ch. 518, L. 1977; R.C.M. 1947, 51-513.

30-14-214. Fair price for agricultural products. (1) The following method shall be used in determining fair prices for agricultural products sold on local markets in a trade area, district, or city in which the major portion of an agricultural commodity or product is produced within or adjacent to the trade area, city, or district:

(a) When 75% of the producers of an agricultural product or commodity marketing those products or commodities within a trade area, district, or city determine what is a fair price based upon competitive and other factors for their product or commodity, it shall be the fair price for that product or commodity under the terms of this part.

(b) Those producers through their agents shall file with the department the fair price and request a hearing for the establishment of fair prices to jobbers, wholesalers, retailers, and consumers of the agricultural products or commodities. An organization representing consumers may not be denied representation at the hearing.

(2) After the establishment of a schedule of fair prices for the agricultural products or commodities, it is a violation of this part for a producer, jobber, wholesaler, or retailer to sell or buy an agricultural commodity or product below the price established by the department. Such action is punishable under the terms provided in this part.

History: En. Sec. 5-A, Ch. 80, L. 1937; amd. Sec. 120, Ch. 431, L. 1975; Sec. 51-106, R.C.M. 1947; amd. and redes. 51-514 by Sec. 14, Ch. 518, L. 1977; R.C.M. 1947, 51-514.

30-14-215. Rebates forbidden. (1) The secret payment or allowance of rebates, refunds, commissions, or unearned discounts, whether in the form of money or otherwise, or secretly extending to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, to the injury of a competitor and when such payment or allowance tends to destroy competition, is an unfair trade practice, and any person resorting to such trade practice is guilty of a misdemeanor and on conviction is subject to the penalties set out in 30-14-224.

(2) However, nothing in this section prevents a cooperative association, organized and operating on a true cooperative basis, from returning to the members, producers, or consumers the whole or any part of the net earnings

or surplus resulting from its trading operations in proportion to their purchases or sales from, to, or through the association.

History: En. Sec. 7, Ch. 80, L. 1937; Sec. 51-108, R.C.M. 1947; amd. and redes. 51-515 by Sec. 15, Ch. 518, L. 1977; R.C.M. 1947, 51-515.

30-14-216. Pooling of grain prohibited. (1) It is unlawful for any person engaged in the buying, selling, or handling of grain in any public local warehouse in this state or for the local agent in charge of such warehouse or any other agent of the person operating the same to enter into a contract, agreement, or understanding with any other person owning or operating any other public local warehouse at any railway station or with its agent whereby:

(a) the amount of grain to be received or handled by the warehouses at such station is to be equalized or pooled between the warehouses;

(b) the profits or earnings derived from the warehouses are to be divided, pooled, or apportioned in any manner; or

(c) the price to be paid for any kind of grain at such station is to be fixed or in any manner affected.

(2) Each day of the continuance of any such agreement, contract, or understanding constitutes a separate offense.

History: En. Sec. 1, Ch. 69, L. 1915; re-en. Sec. 10912, R.C.M. 1921; Sec. 94-1115, R.C.M. 1947; redes. 51-411 by Sec. 29, Ch. 513, L. 1973; re-en. Sec. 10912, R.C.M. 1935; amd. and redes. 51-516 by Sec. 16, Ch. 518, L. 1977; R.C.M. 1947, 51-516.

30-14-217. Destruction of food. It is unlawful for any person to destroy or to withhold from sale for a period of time which makes it necessary to destroy, in restraint of trade, any fish, fowl, animal, vegetable, or other product or article which is customary or proper food for human beings and is in fit sanitary condition to be used as such.

History: En. Sec. 1, Ch. 16, L. 1919; re-en. Sec. 10914, R.C.M. 1921; Sec. 94-1117, R.C.M. 1947; redes. 51-413 by Sec. 29, Ch. 513, L. 1973; re-en. Sec. 10914 R.C.M.; amd. and redes. 51-517, by Sec. 17, Ch. 518, L. 1977; R.C.M. 1947, 51-517.

30-14-218. Alteration of invoices prohibited. It is unlawful for a person to change, alter, substitute, or falsify an invoice if the practice tends to injure a competitor, destroy competition, or mislead a court or the department. Such practice is unfair trade practice and a person resorting to that trade practice is guilty of a misdemeanor and is subject to the penalties provided in 30-14-224.

History: En. Sec. 4, Ch. 50, L. 1939; amd. Sec. 124, Ch. 431, L. 1975; Sec. 51-116, R.C.M. 1947; amd. and redes. 51-518 by Sec. 18, Ch. 518, L. 1977; R.C.M. 1947, 51-518.

30-14-219. Recovery on illegal contracts forbidden. A contract, express or implied, made by a person in violation of any of the provisions of 30-14-205 through 30-14-218 is an illegal contract and no recovery thereon may be had.

History: En. Sec. 9, Ch. 80, L. 1937; Sec. 51-110, R.C.M. 1947; amd. and redes. 51-522 by Sec. 22, Ch. 518, L. 1977; R.C.M. 1947, 51-522.

30-14-220. Enforcement by department. (1) The department shall prevent a person from violating any of the provisions of this part.

(2) Upon receiving notice that a person is violating or has violated any of the provisions of this part, the department shall immediately direct the

person giving the notice either to appear before the director of the department or to make a written reply to show probable cause of a violation. If probable cause is shown, the department shall:

(a) make its own investigation;

(b) within 60 days of the finding of probable cause make a written report of its investigation; and

(c) mail a copy of its findings to the person initially giving notice of a violation.

(3) (a) If the department, after an investigation, has reason to believe that the person has been or is engaging in any course of conduct or doing any act in violation of this part and if it appears to the department that a proceeding by it would be in the interest of the public, it shall issue and serve upon the person a complaint stating the charges and containing a notice of a hearing at a place and upon a day not less than 5 days after the service of the complaint.

(b) A complaint may be amended by the department in its discretion at any time 5 days prior to the issuance of an order based on it.

(c) The person so complained against may appear at the place and time so fixed and show cause why an order should not be entered by the department requiring such person to stop the violation of the law charged in the complaint.

(d) Any person may make application and upon good cause shown may be allowed by the department to intervene and appear in the proceeding by counsel or in person.

(e) The testimony in the proceeding shall be reduced to writing and filed with the department.

(f) If upon the hearing the department believes that the act or conduct in question is prohibited by this part, it shall make findings of fact in writing and issue and cause to be served on the person charged an order requiring such person to stop the acts or conduct.

(g) Until a transcript of the record in the hearing has been filed in a district court, the department may at any time, upon the notice and in the manner it considers proper, modify or set aside, in whole or in part, a report or an order made or issued by it under this section.

(4) A court reviewing an order of the department may issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pending the outcome of the suit.

(5) To the extent that the order of the department is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of the order of the department.

(6) Proceedings under this section shall be given precedence over other civil cases pending in the district court and shall be in every way expedited.

(7) A person who violates an order of the department after it has become final and while the order is in effect shall forfeit and pay to the state a penalty of not more than $1,000 for each violation.

(8) The remedies and method of enforcement of this part provided for in this section are concurrent and in addition to the other remedies provided in this part.

History: En. Sec. 12, Ch. 80, L. 1937; amd. Sec. 1, Ch. 50, L. 1939; amd. Sec. 1, Ch. 142, L. 1967; amd. Sec. 121, Ch. 431, L. 1975; Sec. 51-113, R.C.M. 1947; amd. and redes. 51-519 by Sec. 19, Ch. 518, L. 1977; R.C.M. 1947, 51-519.

30-14-221. Investigations. (1) The department, for the purpose of conducting hearings and investigations which in the opinion of the department are necessary and proper for the exercise of the powers vested in it by this part, shall at all reasonable times have access to any evidence concerning a person being investigated or proceeded against that relates to any matter under investigation or in question and the right to copy such evidence. The department may issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question before the department or before its duly authorized agent conducting the investigation. An agent, duly authorized by the department for those purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. The attendance of witnesses and the production of evidence may be required from any place in this state at any designated place of hearing.

(2) Upon application by the department in a case of contumacy or refusal to obey a subpoena issued to a person, a district court of this state, within the district where the inquiry is carried on or where a person guilty of contumacy or refusal to obey is found, resides, or transacts business, has jurisdiction to issue to that person an order requiring him to appear before the department or its duly authorized agent and to produce evidence if so ordered or to give testimony regarding the matter under investigation. Failure to obey the order of the court may be punished by the court as a contempt.

(3) A person may not be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the department on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. An individual may not be prosecuted or subjected to a penalty or forfeiture for or on account of a transaction, matter, or thing concerning which he is compelled to testify or produce evidence after having claimed his privilege against self-incrimination. An individual so testifying is not exempt from prosecution and punishment for perjury committed in testifying.

History: En. Sec. 3, Ch. 50, L. 1939; amd. Sec. 123, Ch. 431, L. 1975; Sec. 51-115, R.C.M. 1947; amd. and redes. 51-520 by Sec. 20, Ch. 518, L. 1977; R.C.M. 1947, 51-520.

30-14-222. Injunctions — damages — production of evidence. (1) Any person, if injured thereby, or the attorney general may maintain an action to enjoin a continuance of an act in violation of 30-14-205 through 30-14-218 and for the recovery of damages. If in such action the court finds that the defendant is violating or has violated any of the provisions of 30-14-205 through 30-14-218, it shall enjoin the defendant from a continuance thereof. It is not necessary to allege or prove actual damages to the plaintiff.

(2) In addition to such injunctive relief, the plaintiff is entitled to recover from the defendant three times the amount of actual damages sustained.

(3) A defendant in an action brought under this section may be required to testify under the Montana Rules of Civil Procedure. In addition the books and records of any such defendant may be brought into court and introduced

into evidence by reference. No information so obtained may be used against the defendant as a basis for a misdemeanor prosecution under 30-14-205 through 30-14-218 and 30-14-224.

History: En. Sec. 10, Ch. 80, L. 1937; Sec. 51-111, R.C.M. 1947; amd. and redes. 51-521 by Sec. 21, Ch. 518, L. 1977; R.C.M. 1947, 51-521.

30-14-223. Department to institute suit. Upon the third violation of any of the provisions of 30-14-205 through 30-14-218 by any corporation, the department shall institute proper suits or quo warranto proceedings in a court of competent jurisdiction for the forfeiture of its charter, rights, franchises or privileges, and powers exercised by such corporation and to permanently enjoin it from transacting business in this state. If in such action the court finds that the corporation is violating or has violated any of the provisions of 30-14-205 through 30-14-218, it shall enjoin the corporation from doing business in this state permanently or for such time as the court orders or shall annul the charter or revoke the franchise of such corporation.

History: En. Sec. 8, Ch. 80, L. 1937; Sec. 51-109, R.C.M. 1947; amd. and redes. 51-523 by Sec. 23, Ch. 518, L. 1977; R.C.M. 1947, 51-523.

30-14-224. Penalties. (1) Except as otherwise provided in this section, a person, whether as principal, agent, officer, or director, who violates any of the provisions of 30-14-206 through 30-14-218 is guilty of a misdemeanor for each single violation and upon conviction thereof shall be fined not less than $100 or more than $1,000 or imprisoned for a term not to exceed 6 months, or both.

(2) A violation of 30-14-205 is punishable by imprisonment in the county jail for a period not less than 24 hours or more than 1 year or by fine not exceeding $25,000, or both.

(3) When there is a violation of 30-14-216, in addition to the penalty specified in subsection (1), the court before which a conviction is had shall, within 10 days after judgment of conviction is given, forward a certified copy of the judgment to the department of agriculture and that department shall revoke any license issued to the person so convicted. In such case no new license may be granted to the person whose license is revoked or to anyone either directly or indirectly engaged with him in such business for a period of 1 year.

History: En. 51-524 by Sec. 24, Ch. 518, L. 1977; R.C.M. 1947, 51-524; amd. Sec. 9, Ch. 137, L. 1979.

Parts 3 and 4 reserved

Part 5

Personal Solicitation Sales

30-14-501. Purpose. The purpose of this part is to afford consumers subjected to high pressure personal solicitation sales tactics a cooling-off period.

History: En. Sec. 1, Ch. 426, L. 1973; amd. Sec. 1, Ch. 191, L. 1977; R.C.M. 1947, 85-501.

30-14-502. Definitions. As used in this part, the following definitions apply:

(1) "Buyer" means anyone who gives a consideration for the purchase or use of goods or services.

(2) "Personal solicitation" means any attempt by a seller who regularly engages in transactions of the same kind to sell goods or services which are primarily for personal, family, or household purposes, when either the seller or a person acting for him contacts the buyer by telephone or in person other than at the place of business of the seller, except:

(a) an attempted sale in which the buyer personally knows the identity of the seller, the name of the business, firm, or organization he represents, and the identity or kinds of goods or services offered for sale;

(b) an attempted sale in which the buyer has initiated the contact with the seller;

(c) an attempted sale of a newspaper subscription in which the seller is a minor child engaged in both the delivery and the sale of the newspaper; or

(d) an attempted sale of an insurance policy.

(3) "Personal solicitation sale" means the purchase, lease, or rental of any goods or services following a personal solicitation by the seller or a person acting for him, provided the buyer is required to give consideration in excess of $25 in cash or credit therefor.

(4) "Seller" means a lessor, renter, or anyone offering goods or services for consideration, including assignee of a seller.

History: En. 85-502.1 by Sec. 2, Ch. 191, L. 1977; R.C.M. 1947, 85-502.1.

30-14-503. Disclosure obligation. Before any personal solicitation each seller shall, at the time of initial contact or communication with the potential buyer, clearly and expressly disclose the individual seller's name, the name of the business, firm, or organization he represents, the indentity or kinds of goods or services he wishes to demonstrate or sell, and that he wishes to demonstrate or sell the identified goods or services. When the initial contact is made in person, the seller shall also show the potential buyer an identification card which clearly states the seller's name and the name of the business or organization he represents. The disclosures required by this section shall be made before asking any questions or making any statements except an initial greeting. Nonprofit organizations are exempt from the requirements of this section.

History: En. 85-502.2 by Sec. 3, Ch. 191, L. 1977; R.C.M. 1947, 85-502.2.

30-14-504. Buyer's right to cancel — time allowed — notice — return of goods. (1) Except as provided in subsection (5), in addition to any right otherwise to revoke an offer, the buyer or any other person obligated for any part of the purchase price may cancel a personal solicitation sale until midnight of the third business day after the day on which the buyer has signed an agreement or offer to purchase relating to such sale, provided that in the case of a personal solicitation sale made by telephone, the buyer may cancel at any time prior to his signing of an agreement or offer to purchase relating to such sale.

(2) Cancellation occurs when written notice of cancellation is given to the seller.

(3) Notice of cancellation, if given by mail, is considered given when deposited in a mailbox properly addressed and postage prepaid.

(4) Notice of cancellation need not take the form prescribed and shall be sufficient if it indicates the intention of the buyer not to be bound.

(5) A personal solicitation sale may not be canceled if, in the case of goods, the goods cannot be returned to the seller in substantially the same condition as when received by the buyer.

History: **En. Sec. 3, Ch. 426, L. 1973; amd. Sec. 4, Ch. 191, L. 1977; R.C.M. 1947, 85-503.**

30-14-505. Notice of right to cancel. (1) The seller shall furnish the buyer a notice which contains the statement set forth in subsection (a) or a statement as prescribed by federal trade commission rule governing door-to-door sales and printed in capital and lowercase letters of not less than 10-point boldfaced type with the seller's name and business address and the statement set forth in subsection (b):

(a) YOU MAY CANCEL THIS SALE WITHIN THREE BUSINESS DAYS.

If you decide within 3 days that you want to cancel the sale, tear off and mail the bottom of this card. To cancel, the card must be mailed BY CERTIFIED MAIL within 3 days after you sign the contract.

(date)

(b) CONTRACT CANCELED

I hereby cancel this sale.

(Buyer's signature)

(2) Until the seller has complied with this section, the buyer or any other person obligated for any part of the purchase price may cancel the personal solicitation sale by notifying the seller in any manner and by any means of his intention to cancel; provided, however, that failure to mail the cancellation by certified mail does not nullify the cancellation as long as the cancellation is mailed within the prescribed time period. The period prescribed by 30-14-504 shall begin to run from the time the seller complies with this section.

History: **En. Sec. 4, Ch. 426, L. 1973; amd. Sec. 5, Ch. 191, L. 1977; R.C.M. 1947, 85-504.**

30-14-506. Repayment to buyer — retention of goods by buyer. (1) Except as provided in this section, within 10 days after a personal solicitation sale has been canceled or an offer to purchase revoked, the seller shall tender to the buyer any payments made by the buyer and any note or other evidence of indebtedness.

(2) If the down payment includes goods traded in, the goods shall be tendered in substantially as good condition as when received by the seller. If the seller fails to tender the goods as provided by this section, the buyer may elect to recover an amount equal to the trade-in allowance stated in the agreement.

(3) If the seller refuses within the period prescribed by subsection (1) to return the cash down payment or goods tendered as down payment, he shall be liable to the buyer for the entire down payment, and if the buyer is successful in his action therefor, the court shall also award him $100 plus reasonable attorneys' fees and costs.

(4) Until the seller has complied with this section, the buyer may retain possession of goods delivered to him by the seller and shall have a lien on the goods in his possession or control for any recovery to which he may be entitled.

History: **En. Sec. 5, Ch. 426, L. 1973; amd. Sec. 6, Ch. 191, L. 1977; R.C.M. 1947, 85-505; amd. Sec. 10, Ch. 137, L. 1979.**

30-14-507. Redelivery of goods. (1) Except as provided by 30-14-506(4), within a reasonable time after a personal solicitation sale has been canceled or an offer to purchase revoked, the buyer upon demand shall tender to the seller any goods delivered by the seller pursuant to the sale but need not tender at any place other than his residence. If the seller fails to demand possession of such goods within a reasonable time after cancellation or revocation, the goods shall become the property of the buyer without obligation to pay for them. For the purpose of this section, 40 days shall be presumed to be a reasonable time.

(2) The buyer shall take reasonable care of the goods in his possession both before cancellation or revocation and for a reasonable time thereafter, during which time the goods are otherwise at the seller's risk, and such goods must be returned in substantially the same condition as received.

History: **En. Sec. 6, Ch. 426, L. 1973; amd. Sec. 7, Ch. 191, L. 1977; R.C.M. 1947, 85-506.**

30-14-508. Violation. Except where inconsistent with the provisions of this part, a violation of this part is a violation of part 1.

History: **En. 85-507 by Sec. 8, Ch. 191, L. 1977; R.C.M. 1947, 85-507.**

Part 6

Sale of Imitation Indian Articles

30-14-601. Definitions. As used in this part, the following definitions apply:

(1) "Indian" means a person who is enrolled or who is a lineal descendant of one enrolled upon an enrollment listing of the bureau of Indian affairs or upon the enrollment listing of a recognized Indian tribe, domiciled in the United States.

(2) "Imitation Indian arts or crafts articles" means those made by machine or made wholly out of synthetic or artificial materials or articles which are not made by Indian labor or workmanship.

History: **En. Sec. 1, Ch. 42, L. 1967; R.C.M. 1947, 85-301.**

30-14-602. Articles to be designated and segregated. No person shall distribute, sell, or offer for sale in this state any imitation American Indian arts or crafts articles unless the articles are at all times clearly and legibly designated as imitation. All imitation articles shall be physically segregated from authentic Indian articles for display purposes.

History: **En. Sec. 2, Ch. 42, L. 1967; amd. Sec. 1, Ch. 52, L. 1973; R.C.M. 1947, 85-302.**

30-14-603. Designation of authenticity. Only those articles bearing a registered trademark or label of authentic Indian labor or workmanship may be deemed authentic Indian arts or crafts articles.

History: **En. Sec. 3, Ch. 42, L. 1967; R.C.M. 1947, 85-303.**

30-14-604. Violation as misdemeanor. Any person who violates this part is guilty of a misdemeanor.

History: En. Sec. 4, Ch. 42, L. 1967; R.C.M. 1947, 85-304.

Part 7

Fraudulent Financing of Mining and Oil Companies

30-14-701. Mining and oil companies — fraudulent handling of finances. For the purposes of 30-14-701 through 30-14-704, the following acts and offenses relative to the handling of the finances of mine and oil operations within the state of Montana shall be deemed fraudulent:

(1) failure to expend at least 75% of all money raised from the public from the sale of stock or securities of any other kind or character in the actual operation and development of the oil and mining property or in the construction of treating plants or from bona fide payments on the purchase price of state property;

(2) failure to apply net earnings from said operations, after deducting only reasonable and legitimate expenses, to either a reserve fund, distribution of dividends, liquidation of bona fide indebtedness, or reasonable development of said properties;

(3) the operation of holding companies in such a manner as to deprive the stockholders of the parent company of an equitable interest in the earnings of the parent company.

History: En. Sec. 1, Ch. 199, L. 1935; re-en. Sec. 11458.1, R.C.M. 1935; Sec. 94-2322, R.C.M. 1947; redes. 15-22-141 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 15-22-141.

30-14-702. Application. The provisions of 30-14-701 through 30-14-704 shall apply to any person, corporation, or other form of association now operating or which shall hereafter operate a mining or oil enterprise, the finances of which are derived in whole or in part from subscription and security sales to the public, and operating within the state of Montana. The provisions of 30-14-701 through 30-14-704 shall not apply to any person, firm, corporation, or cooperative association holding a permit in good standing from the state investment department or to securities listed on the New York stock exchange, Boston stock exchange, the board of trade of the city of Chicago, the Chicago stock exchange, or the New York curb exchange.

History: En. Sec. 2, Ch. 199, L. 1935; re-en. Sec. 11458.2, R.C.M. 1935; Sec. 94-2323, R.C.M. 1947; redes. 15-22-142 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 15-22-142.

30-14-703. Investigation of complaints. Any stockholder or creditor of a mining or oil company as heretofore provided in 30-14-701 through 30-14-704 who has bona fide reason to believe that the provisions of 30-14-701 through 30-14-704 have been violated may complain relative thereto to the attorney general of the state, the county attorney of the county in which the property is located, or the state securities commissioner, and it shall be incumbent upon the officers mentioned to make a complete investigation of the records and affairs of said corporation or corporations. In the event the facts disclose the violation of the provisions of 30-14-701 through 30-14-704, it shall be the duty of the officer to prefer charges against the officers and directors of the corporation or corporations involved.

History: En. Sec. 3, Ch. 199, L. 1935; re-en. Sec. 11458.3, R.C.M. 1935; Sec. 94-2324, R.C.M. 1947; redes. 15-22-143 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 15-22-143; amd. Sec. 8, Ch. 351, L. 1979.

30-14-704. Penalty. Any person or the officers or directors of any corporation, cooperative association, or any other association of any kind or character found guilty of the violation of the provisions of 30-14-701 through 30-14-704 shall be subject to imprisonment in the state prison for a term of not less than 90 days or more than 3 years or by a fine of not less than $100 or more than $1,000 or both such fine and imprisonment.

History: En. Sec. 4, Ch. 199, L. 1935; re-en. Sec. 11458.4, R.C.M. 1935; Sec. 94-2325, R.C.M. 1947; redes. 15-22-144 by Sec. 29, Ch. 513, L. 1973; R.C.M. 1947, 15-22-144.

CHAPTER 15

FOREIGN-TRADE ZONES

Part 1 — General Provisions

Section
30-15-101. Authority to establish, operate, and maintain a foreign-trade zone.
30-15-102. Exemption from state licensing requirements and regulations.
30-15-103. Jurisdiction of state.
30-15-104. Taxation of corporations operating foreign-trade zones and their goods.

Part 1

General Provisions

30-15-101. Authority to establish, operate, and maintain a foreign-trade zone. (1) The state of Montana, a local government unit, or a private or public corporation organized in Montana for the purpose of operating a foreign-trade zone in Montana may apply for the right to and, if the right is granted, establish, operate, and maintain a foreign-trade zone under 19 USC 81a through 19 USC 81u.

(2) The governing body of a local government unit may contract with a private or public corporation to operate and maintain a foreign-trade zone that the local government unit has been granted the right to establish, operate, and maintain.

(3) Any activity authorized by the United States to be conducted within a foreign-trade zone may be conducted within a foreign-trade zone operated by a local government unit or Montana corporation under this section.

History: En. Sec. 1, Ch. 674, L. 1979.

30-15-102. Exemption from state licensing requirements and regulations. Goods may be held within a foreign-trade zone exclusive of any license, permit, or regulation of the state or any political subdivision of the state. Such goods may be sold or traded subject to the laws of the United States.

History: **En. Sec. 2, Ch. 674, L. 1979.**

30-15-103. Jurisdiction of state. The state of Montana reserves jurisdiction in a foreign-trade zone in all civil and criminal matters except those related to customs, diversity suits with the requisite amount in controversy, or suits involving a federal question.

History: **En. Sec. 3, Ch. 674, L. 1979.**

30-15-104. Taxation of corporations operating foreign-trade zones and their goods. (1) All goods held in a foreign-trade zone are subject to inventory taxation.

(2) Private or public corporations operating foreign-trade zones are subject to all taxes imposed upon them under the provisions of Title 15.

History: **En. Sec. 4, Ch. 674, L. 1979.**

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